VOLUME VI

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 28

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN SECRETARY OF THE INTERIOR, PETITIONER

vs.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.

No. 29

THE VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

vs.

THE FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC POWER COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1952
CERTIORARI GRANTED MAY 5, 1952

SUPREME COURT OF THE UNITED STATES

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Project No. 2009, North Carolina

FEDERAL POWER COMMISSION,
Washington 25, October 29, 1948.

The Honorable the SECRETARY OF THE INTERIOR,
Washington, D. C.

DEAR SIR: Virginia Electric and Power Company, of Richmond, Virginia, has filed with this Commission an application for a license for a water-power project (No. 2009) to be located on Roanoke River in Halifax and Northampton Counties, North Carolina.

The proposed project would consist of a dam about 2,840 feet long constructed mainly of mass concrete, having a gated spillway section, an emergency overflow section, a powerhouse intake section, and a bulkhead section at each end, located near Roanoke Rapids, North Carolina, and in the vicinity of an existing diversion dam; a reservoir extending about 7½ miles upstream with an area of about 4,900 acres at normal pond level (elevation 132 feet above mean sea level); a powerhouse integral with the dam containing four generating units with aggregate capacity of about 98,000 horsepower, one of which would discharge into the canal which leads to the existing Roanoke Rapids plant; and appurtenant facilities.

One print of Exhibit J (F. P. C. No. 2009–1) and one print of Exhibit L (F. P. C. No. 2009–2), which were submitted as part of the application, are enclosed.

It is requested that you give the Commission your views as to the measures which should be taken to protect wildlife resources in connection with the project in accordance with the provisions of Public Law 732 79th Congress, 2d session, approved August 14, 1946. Your advice concerning fishways is also requested pursuant to the provisions of section 18 of the Federal Power Act, 16 U. S. C. 811.

You are also invited to report otherwise on the application to the extent that you may deem desirable.

If no response is received within 90 days from the date of this letter, it will be assumed that you do not desire to submit any comments.

Very truly yours,

LEON M. FUQUAY,
Secretary.

5 *Exhibit 2*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, January 6, 1949.

DEAR MR. SMITH: Reference is made to the Commission's letter of October 29, 1948, requesting a report from the Department of the Interior on the application of the Virginia Electric and Power Company to construct a project (No. 2009) on the Roanoke River at Roanoke Rapids in North Carolina.

Upon consideration of the various matters pertaining to the development of the Roanoke River Basin, the plans approved by Congress in the Flood Control Act of 1944, the functions and duties of the Secretary of the Interior to dispose of the surplus power and energy from these developments when constructed, and the facts pertaining to the application referred to, it appears that:

"1. Congress in the Flood Control Act of 1944 approved the general plan for the comprehensive development of the Roanoke River Basin by the United States as recommended by the Chief of Engineers and substantially concurred in by the Federal Power Commission.

"2. In accordance with this plan of development by the United States, the power and energy to be generated at Roanoke Rapids will supplement the power and energy to be generated at the Buggs Island and Philpott projects now under construction, and will facilitate the disposition of the power and energy from the entire development of the Roanoke River Basin by the Secretary of the Interior in accordance with the policies and standards prescribed in Section 5 of the Flood Control Act of 1944.

"3. The plan of development proposed by the Virginia Electric and Power Company is not best adapted to conserve and utilize the water power resources of the Roanoke River Basin in the public interest."

Accordingly, the Department is opposed to the application of the Virginia Electric and Power Company. We shall enter an appearance and move that the Company's application be dismissed for want of jurisdiction or, if the Commission is of the opinion that it has jurisdiction to entertain the application, that the same be denied.

6 We shall supplement this letter at a later date in order to present the Commission the views of the Geological

Survey and the Fish and Wildlife Service concerning the proposed project.

Sincerely yours,

J. A. KRUG,
Secretary of the Interior.

Hon. NELSON LEE SMITH,
Chairman, Federal Power Commission.

7 *Exhibit 3*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., January 24, 1949.

MY DEAR MR. SMITH: By letter dated January 6, 1949, you were advised that for reasons stated the Department was opposed to the issuance of a license to the Virginia Electric and Power Company to construct a power project (No. 2009) on the Roanoke River at Roanoke Rapids in North Carolina, and that the Department would enter an appearance and move that the Company's application be dismissed for want of jurisdiction or, if the Commission is of the opinion that it has jurisdiction to entertain the application, that the same be denied.

This supplemental letter presents the views and recommendations of the Fish and Wildlife Service as to measures which should be taken to protect wildlife resources, and also other comments as requested in the Commission's letter dated October 29, 1948. The views and recommendations stated herein should not be considered as modifying in any way the Department's recommendation of January 6, 1949, that the application for a license to the Virginia Electric and Power Company be dismissed or denied.

The proposed project has been investigated by regional representatives of the Fish and Wildlife Service. Conferences with officials of the Virginia Electric and Power Company and the Stone and Webster Engineering Company, and advice received from the North Carolina Wildlife Resources Commission have helped to clarify the operation of the project and its probable effects on fish and wildlife resources.

It is understood that the proposed dam which would be located about one and one-half miles upstream from Roanoke Rapids would impound a reservoir extending about seven and one-half miles upstream. At normal operating level, elevation 132 feet, the impoundment would have a surface area of 4,900 acres. Total storage capacity at Roanoke Rapids would be 70,000 acre-feet of which only 10,000 acre-feet, or the top two vertical feet of pondage, would be involved in normal operation. The generating plant would have a capacity of 18,000 second-feet and one unit of this

plant having a capacity of 3,000 second-feet would operate during off-peak hours.

The Fish and Wildlife Service is primarily concerned with the effects of the operation of the project upon spawning runs of striped bass. The Roanoke River spawning areas support a commercial fishery for this fish having an annual value of about half a million dollars. An important sport fishery also is jeopardized. The major spawning area is about six miles below the proposed dam, in the vicinity of Weldon, North Carolina.

8 Striped bass enter the Roanoke River during late April and early May, usually on a rise of water. The majority spawn in the section of river between Halifax and Weldon, North Carolina, but some fish ascend to the foot of Roanoke Rapids, a natural barrier to their migration. The eggs which are semibuoyant and are moved by currents hatch in from 36 to 48 hours, depending upon water temperature. It is essential to the maintenance of the valuable striped-bass fishery that adequate flows of water prevail in the lower Roanoke River during the period when the fish are about to enter and while they are present in the streams.

The Buggs Island Project, now under construction by the Corps of Engineers, is located forty-two miles above the proposed Roanoke Rapids Project and its planned mode of operation is pertinent to this discussion. To prevent deleterious effects upon the downstream fishery, the Corps of Engineers, in cooperation with the Fish and Wildlife Service, has developed a plan of operation for the Buggs Island Project allowing for the passage of between 2,000 and 2,500 second-feet of water during off-peak hours, average weekly releases during April varying from 2,300 to 16,000 second-feet with a monthly average of 8,500 second-feet, and a minimum daily flow of about 2,000 second-feet during the spawning period. Stream flow records show daily flows varying between 2,000 and 8,000 second-feet during known periods of successful spawning, and average flows for these periods of from 3,000 to 5,000 second-feet.

Provision of the above average daily flows from Buggs Island Reservoir would insure smoothed-out flows at Weldon adequate to protect the fishery resource. In the case of the proposed project at Roanoke Rapids, however, because of its proximity to the vital striped-bass spawning areas, assurance of adequate sustained (instantaneous) minimum flows is required. Plans to utilize the relatively small active storage of the reservoir for production of peaking power necessitates some limitation on changes in rate of discharge. The promise of protection to the fishery resource inherent in the cooperatively scheduled operation of Buggs Island Project should not be nullified by undesirable modification of the stream flow at Roanoke Rapids.

Because of the ratio of reservoir capacity to annual runoff and because the spawning period may be expected to precede the annual thermal stratification of the proposed reservoir, it does not appear necessary that any special provision be made for control of the temperature of the water discharged from the project reservoir: Neither is it requested that any provision be made for the passage of migratory fish at the dam.

In the interest of fish and wildlife resources, it is requested that should a license be issued for the Roanoke Rapids Project, the following conditions be incorporated therein:

"1. During the period from April 1 to June 1 of each year, except as the closing date of this period may be advanced upon advice from the North Carolina Wildlife Resources Commission that the spawning of striped bass in the river below has been successfully completed, a minimum (instantaneous) discharge of 2,000 second-feet of water from the project reservoir to the Roanoke River below the project dam shall be maintained. During the remainder of each year, a minimum discharge of 1,000 second-feeet shall be provided at all times.

"2. The volume of controllable releases of water from the project reservoir shall not be permitted to increase to double, or to decrease to half, of any prevailing discharge in less than one hour.

"3. The entire project area, except for such portions as may be reserved for reasons of safety and efficient operation, shall be open to free use by the public for the purposes of fishing, hunting, and other recreational pursuits.

"4. Practical means of mitigating the losses to fish and wildlife occasioned by the construction and operation of the project, of increasing the biological productivity of the project area, and of furthering its public use for recreational enjoyment, shall be devised and developed by the licensee in cooperation with the North Carolina Wildlife Resources Commission and the United States Fish and Wildlife Service.

"5. The licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modifications of the project structure and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Commission upon the recommendation of the Secretary of the Interior."

The records of the Geological Survey indicate that the construction and use of the project as proposed will not affect adversely the purposes of any withdrawal or classification recommended by the Geological Survey, deposits of coal or other minerals, or lands within the known geologic structure of a producing oil or gas field.

The interests of the National Park Service and the Bureau of Mines will not be adversely affected by the project.

Since this letter outlines briefly the plan of operation developed by the Corps of Engineers in cooperation with the Fish and
10 Wildlife Service for the Buggs Island Project located forty-two miles upstream, a copy of this letter is being sent to the Chief of Engineers.

Sincerely yours,

WILLIAM E. WARNE,
Assistant Secretary of the Interior.

Hon. NELSON L. SMITH,
Chairman, Federal Power Commission.

11 *Exhibit 4*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., February 16, 1949.

MY DEAR MR. SMITH: By letter of January 24, 1949, the views and recommendations of the Fish and Wildlife Service relative to the application by the Virginia Electric and Power Company for a license to construct a power project (No. 2009) on the Roanoke River at Roanoke Rapids in North Carolina were transmitted to you. This letter supplemented, but did not alter, the previously expressed advice of the Department that license for this project be dismissed or denied.

The following sentences are quoted from the referenced letter, "The Fish and Wildlife Service is primarily concerned with the effects of the operation of the project upon spawning runs of striped bass. The Roanoke River spawning areas suport a commercial fishery for this fish having an annual value of about half a million dollars." This statement of the value of the commercial harvest of striped bass is incorrect. Properly, the average annual catch of striped bass is about 540,000 pounds of fish having a value of roughly $60,000.

The Fish and Wildlife Service and the Department regret that you were misadvised. It is hoped that correction of the inadvertency will occasion no great inconvenience.

Sincerely yours,

WILLIAM E. WARNE,
Secretary of the Interior.

HON. NELSON L. SMITH,
Chairman, Federal Power Commission.

12 *Exhibit 5*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., May 6, 1949.

MY DEAR MR. SMITH: By letter dated April 11, 1949, you advised that the Virginia Electric and Power Company had filed an amendment to its application for a license for a proposed power project (No. 2009) on the Roanoke River in North Carolina. You requested to be advised if the changes in the proposed project would modify comments or recommendations made heretofore.

The Department's position concerning the issuance of a license, of which you have previously been advised, is not affected by the amendment of the application proposing to increase the generating capacity from 98,000 horsepower to 125,000 horsepower.

A preliminary review by the Fish and Wildlife Service of the amended application suggests that recommendations for the protection of fish and wildlife interests may be advanced similar to those submitted in connection with the original application. However, it is impractical for the Fish and Wildlife Service to offer firm comment on the amended application at this early date, and an extension of time of 60 days, until June 27, in which to analyze the amended proposal and prepare comments thereon is requested by the Fish and Wildlife Service.

Because of the importance of the fish and wildlife resources which may be affected by project No. 2009, the Acting Director, Fish and Wildlife Service, advised the Secretary of the Federal Power Commission by letter dated April 28, 1949, that the Service plans to have Mr. H. A. Goodwin, who is acquainted with the project and with the fish and wildlife interests, in attendance at the hearing to be held on May 12. Opportunity to present a statement is not requested; however, Mr. Goodwin will be in a position to restate the relationship of the proposed project to fish and wildlife interests if a request for such information should occur in the course of the hearing.

Sincerely yours,

(S) WILLIAM E. WARNE,
Assistant Secretary of the Interior.

Hon. NELSON L. SMITH,
Chairman, Federal Power Commission

13 *Exhibit No. 6*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, July 11, 1949.

MY DEAR MR. SMITH: Reference is made to the Commission's letter dated October 29, 1948, requesting the Department's views and recommendations concerning measures which should be taken to protect wildlife resources in connection with the application of the Virginia Electric and Power Company of Richmond, Virginia, for a license for a water power project (No. 2009) on Roanoke River at Roanoke Rapids, N. C., and to the Commission's letters dated January 26, 1949, and April 11, 1949, advising of proposed changes in the project and requesting views of the Department thereon.

Departmental letters dated January 24, 1949, February 16, 1949, March 11, 1949, and June 9, 1949, contained the views and recommendations of the Fish and Wildlife Service based upon studies and examinations completed as of those respective dates. Studies and investigations have now been completed of the anticipated effect of the proposed project as modified in the amended application, dated April 6, 1949, and on which the Commission requested the views of the Department by letter dated April 11, 1949.

As previously reported a run of striped bass utilizes the Roanoke River for spawning each spring and it is the effects of project operations upon this highly valuable resource, extensively utilized both for sport and commercial purposes, which primarily concern the Fish and Wildlife Service of the Department of the Interior. Provisions of the amended application are unfavorable to the conservation of striped bass. Relatively, however, these modifications of the early plans are of small importance, since either the former or the amended proposal jeopardizes the maintenance of this fishery. Operated, as planned, solely in the interest of power production, the Roanoke River project may be expected to decimate the striped bass.

On the other hand, if consideration is given to the preservation of fish and wildlife resources in establishing the operational regimen of the project, its construction should not occasion any major detriment to these interests. The following five recommendations have been formulated by the Fish and Wildlife Service with a view toward imposing minimal restriction of the primary power objective of the project compatible with the requirements for the protection of existing fish and wildlife resources. I recommend that these recommendations be included as stipulations of any license which may be issued for this proposed water power development.

14 1. "Except as hereinafter provided, sufficient water shall be released from the project reservoir to maintain minimum flows in the Roanoke River, as measured at the highway bridge at Roanoke Rapids, in accordance with the following tabulation. The similar flows listed for week end requirements are predicated upon a diminished influx of pollutanta:

Annual interval	Minimum rate of flow	Second-feet	Annual interval	Minimum rate of flow	Second-feet
	Week day	Week end		Week day	Week end
January to April, inc	500	500	September	1,600	800
May	1,250	600	October	1,250	600
June to August, inc	2,000	1,000	November and December	500	500

"The releases needed to maintain these tabulated flows shall be supplemented as necessary to provide a minimum rate of flow of 2,000 second-feet from April 1 to June 1 of each year, except as this period may be modified upon the advice of the North Carolina Wiidlife Resources Commission. Modification of the period during which basic minimum flows are augmented to the 2,000 second-foot level in accommodation to annual variations in the time and duration of spawning activities of the striped bass, and in accordance with the recommendations of the North Carolina Wildlife Resources Commission, shall be limited as follows: the date of inauguration of the supplemental spawning-period flows shall not be advanced beyond March 15, nor retarded beyond April 15; the date of conclusion of the augmented spawning-period flows shall not be advanced beyond May 15, nor retarded beyond June 15; and the duration of the period of these spawning-period flows shall not exceed 75 days in any one year.

2. "The volume of controllable releases of water from the project reservoir shall not be permitted to increase to double, or to decrease to half, of any prevailing discharge in less than one hour during the spawning period of striped bass. The spawning period shall be the period from April 1 to June 1 of each year, except as modified upon the recommendations of the North Carolina Wildlife Resources Commission as provided under recommendation 1 above.

3. "The entire project area, except for such portions as may be reserved for reasons of safety and efficient operation, shall be open to free use by the public for the purposes of fishing, hunting, and other recreational pursuits.

15 4. "Practical means of mitigating the losses to fish and wildlife occasioned by the construction and operation of the

project, of increasing the biological productivity of the project area, and of furthering its public use for recreational enjoyment, shall be devised and developed by the licensee in cooperation with the North Carolina Wildlife Resources Commission and the United States Fish and Wildlife Service.

5. "The licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modifications of the project structure and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Commission upon the recommendation of the Secretary of the Interior."

These recommendations for the inclusion of the above stipulations in any license are made without in any manner abandoning the position previously taken by the Department that the application for a license for this project be dismissed or denied by the Federal Power Commission.

Sincerely yours,

(S) WILLIAM E. WARNE,
Assistant Secretary of the Interior.

Hon. NELSON L. SMITH,
Chairman, Federal Power Commission.

cc: Div. of Power, Fish and Wildlife Service, Corps of Engineers, North Carolina Wildlife Resources Commission.

16 Before Federal Power Commission

Before Commissioners: Nelson Lee Smith, Chairman, Thomas C. Buchanan, Claude L. Draper, Leland Olds, and Harrington Wimberly.

MARCH 22, 1949.

Project No. 2009

IN THE MATTER OF VIRGINIA ELECTRIC AND POWER COMPANY

Order setting hearing

On October 6, 1948, Virginia Electric and Power Company of Richmond, Virginia, filed an application for a license under the Federal Power Act, which would authorize the construction, operation, and maintenance of a proposed hydroelectric development (Project No. 2009) on the Roanoke River near Roanoke Rapids, North Carolina.

The Roanoke River Basin was made the subject of study by the Chief of Engineers of the Department of the Army and the results of that study were submitted to Congress (House Doc. No. 650, 78th Cong. 2d Sess.). The general plan of the Army Engineers for

comprehensive development of the Roanoke River Basin was approved by Congress in the Flood Control Act of 1944 (58 Stat. 887). Congress in that Act also authorized and appropriated funds for the development of the Roanoke River Basin for flood control and other purposes at two sites (Buggs Island and Philpott) upstream from the site proposed for development by the applicant herein, and such construction of the facilities at the Buggs Island and Philpott sites has been commenced by the United States.

The applicant's plan for development of the Roanoke Rapids site does not conform to the recommendations of the Army Engineers. The Secretary of the Interior has notified the Commission that his Department will oppose the issuance of license to the applicant on two grounds: (1) that since Congress has approved the plan of the Army Engineers for development of the Roanoke River Basin, which includes the Roanoke Rapids site, this approval constitutes a determination by Congress that the sites studied and recommended for development by the Army Engineers should be developed by the United States itself, and thus the Commission lacks jurisdiction to entertain the application; and (2) that the applicant's plan for development, differing as it does from the proposal of the Army Engineers, would not be best adapted to conserve and utilize the water power resources of the Roanoke River Basin in the public interest.

In addition to the opposition described above, the Department of the Interior has submitted certain recommendations to the Commission relative to the construction and operation of any project at Roanoke Rapids, for the protection of fish and wildlife resources in the region to be affected by the proposed project.

The Commission finds:

The applicant, the staff, and all others interested should be afforded an opportunity to present their views together with pertinent data relative to (1) the question of the Commission's authority under the Federal Power Act to entertain the application
17 for license herein; (2) the question of whether the development of the Roanoke Rapids site should be undertaken by the United States itself; and (3) the question of whether the plans proposed by the applicant for development of the Roanoke Rapids site are best adapted to a comprehensive plan for improving or developing the Roanoke River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; or, if such plans require modification, what modification is necessary in order to warrant approval under Section 10 (a) of the Federal Power Act.

The Commission orders:

A public hearing be held commencing on May 12, 1949, at 10:00 a. m. (e. s. t.) in the Hearing Room of the Federal Power Commission, Hurley-Wright Building, 1800 Pennsylvania Avenue NW., Washington, D. C., respecting the matters involved and the issues presented in this proceeding.

By the Commission.

J. H. GUTRIDE,
Acting Secretary.

Date of Issuance: March 22, 1949.

19 Before the Federal Power Commission

Project No. 2009

IN THE MATTER OF VIRGINIA ELECTRIC AND POWER COMPANY

Petition to intervene

To the Honorable the Federal Power Commission:

Comes now Julius A. Krug, Secretary of the Interior, and submits this Petition to Intervene in the matter referred to above, and as reasons for his intervention says:

1. That he is a citizen of the United States and is the Secretary of the Interior and the head of the Department of the Interior, one of the executive departments of the United States Government.

2. That he has an interest in this matter, and that his interest is as follows:

(a) At various times Congress has passed acts authorizing the Corps of Engineers to undertake the construction of projects and to undertake the development of river basins for the improvement of navigation, flood control, and other purposes, including power purposes. One of these acts is the Flood Control Act of December 22, 1944, and one of the developments so authorized is that of the Roanoke River basin. In section 10 of this act (58 Stat. 891, 894)

20 Congress approved the comprehensive plan of development of the river basin as recommended by the Chief of Engineers in House Documents No. 650, 78th Congress, 2nd Session, which recommendations were that the development of the river basin, consisting of 11 projects, be carried out on a step-by-step basis under the direction of the Secretary of War and the supervision of the Chief of Engineers, that the Buggs Island project on the Roanoke River and the Philpott project on the Smith River, be undertaken as the initial step in the development, and that the remaining nine projects be undertaken subsequently, with the Gaston and Roanoke Rapids projects as the next steps in the Buggs Island part of the development.

(b) By section 5 of the Flood Control Act of 1944 (58 Stat. 887), Congress constituted your petitioner as the marketing authority for the surplus power and energy generated at all projects under the control of the Department of the Army. This authority extends to the projects already constructed, those under construction, and those to be constructed in accordance with the plans adopted, authorized, or approved by Congress. Your petitioner is thus charged with the function and duty to dispose of the power and energy from such projects in accordance with the standards prescribed by Congress, and to safeguard the power benefits of such projects for the United States and the consumers of this power and energy.

3. That the interest of your petitioner in the performance of his functions and duties would be substantially and adversely affected by the grant of a license to the Virginia Electric and Power Company to construct a project at Roanoke Rapids on the Roanoke River for the reasons that:

21 (a) The Roanoke Rapids site has been reserved by Congress for development by the United States.

(b) The Roanoke Rapids project will affect the development of the Roanoke River basin undertaken by the United States, and

(c) By granting such license to the Virginia Electric and Power Company the Commission will give away power benefits of great proportions, which power benefits petitioner is charged by law to safeguard for the United States.

4. The position of your petitioner is that:

(a) Section 10 of the Flood Control Act of 1944 directs that the development of the Roanoke River basin, including the site at Roanoke Rapids, be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers, to the exclusion of private development. The fact that in this case construction of the Roanoke Rapids project has not yet begun, or that Congress has not yet appropriated funds for the construction of the project, or that Congress has not yet specifically authorized the construction of this particular project, is immaterial. It is sufficient that Congress has by law approved the development recommended by the Chief of Engineers, including his recommendations that the development be executed on a step-by-step basis under the direction of the Secretary of the Army and the supervision of the Chief of Engineers, that the Buggs Island and Philpott projects be constructed as the initial step in the development, and that the Gaston and Roanoke Rapids

22 projects be constructed as the next step in the Buggs Island part of the development. Whether the approval of the plan by Congress is regarded as a command, or as a mere authorization,

or as a declaration of policy, or as a finding of fact, it deprives the Commission of authority to grant a license for the Roanoke Rapids project.

(b) The Commission divested itself of jurisdiction to approve an application for a project at Roanoke Rapids when, on May 3, 1944, it concurred in the recommendations of the Corps of Engineers that the Roanoke River basin be developed by the United States. Such is the meaning, operation, and effect of section 7 (b) of the Federal Power Act, when interpreted in accordance with the purposes of the statute and the language of the section, and especially in the light of the changes effected by the 1935 amendment to section 7 of the Federal Water Power Act of 1920. The application of the Virginia Electric and Power Company is for the same development which, in the judgment of the Commission expressed in the letter to the Chief of Engineers, should be reserved for the United States itself. Even if the Commission's determination as to the development of the water resources of the Roanoke River by the United States were limited to the construction of the Buggs Island project, section 7 (b) of the Federal Power Act would operate as a bar to the Commission's jurisdiction, because the present application is for a project affecting such development. The action taken by Congress in section 10 of the Flood Control Act, when considered in relation to the Commission's previous concurrence in the plans of the Corps of Engineers, which concurrence was before Congress as part of
23 House Document No. 650 referred to above, made the divestiture of the Commission's jurisdiction final and complete.

(c) The grant of a license to the Virginia Electric and Power Company for the construction of the Roanoke Rapids project would require reexamination of the facts and a reversal of the Commission's previous concurrence in the finding of the Corps of Engineers that the development of the Roanoke River Basin should be undertaken by the United States. Quite apart from the Commission's power to do so, such reexamination and reversal would be beyond the limits of administrative propriety, because such action would also involve a reversal of the findings of the Chief of Engineers arrived at in the discharge of his duties under a directive of Congress, which findings should be regarded as conclusive under the facts of this case and the principle of administrative comity. Such reexamination and reversal of the Commission's previous determination would of necessity have to be transmitted to Congress. This would also be inappropriate, because Congress has already acted upon and approved the Commission's previous findings and the Commission when acting in a quasi-legislative capacity cannot with propriety take the position that Congress acted improperly or unwisely in approving the

plan of development proposed by the Chief of Engineers, as has been so aptly ruled by the United States Circuit Court of Appeals for the Fourth Circuit in Savannah River Electric Company v. Federal Power Commission, 164 F. (2d) 408, 411–12.

(d) the public interest demands that this application be denied. The public policy of the United States is to be gathered from the enactment of Congress. The Federal Power Policy,
24 evolved in the past four decades of legislation on the utilization of water power resources developed by the Government, is a policy against the monopolization of these water resources and for the most widespread use of the power by consumers at the lowest rates compatible with the maintenance of adequate electric service. This policy was made applicable to flood control projects and was clarified and implemented in section 5 of the Flood Control Act of 1944 by vesting in the Secretary of the Interior the function of marketing the energy from these projects in accordance with specific standards. The Federal Power Policy and the functions of the Secretary should be a controlling consideration on the question whether a project should be licensed or reserved for the development by the United States.

(e) To grant a license for private power development at Roanoke Rapids would deprive the United States, and also the consumers of power to be generated, of benefits of great proportions and would be tantamount to giving these power benefits away to the applicant, when they were intended by Congress for the consumers.

(f) The elimination of the Roanoke Rapids project from the development of the Roanoke River basin by the United States would cast an additional burden upon the Secretary of the Interior and would render more difficult the sale of Buggs Island power in the manner required by law.

25 For these reasons, it is respectfully submitted that the Secretary of the Interior has a sufficient interest to warrant his intervention in this matter, and that this petition to intervene should be granted.

Respectfully submitted.

JULIUS A. KRUG,
Secretary of the Interior.
By MASTIN G. WHITE,
Solicitor of the Department of the Interior.

Gregory Hankin,
GREGORY HANKIN,
Of Counsel.

26 Certificate of service (omitted in printing).

27 *Authority in support of the petition to intervene*

Rule 1.8 (b) of the Commission's Rules of Practice and Procedure provides:

"*Who may petition.*—A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be:

"(1) *A right conferred by statute* of the United States;

"(2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding (the following may have such an interest: consumers served by the applicant, defendant, or respondent; holders of securities of the applicant, defendant, or respondent; and *competitors* of the applicant, defendant, or respondent).

"(3 Any other interest of such nature that the *petitioner's participation may be in the public interest.*" [Italics supplied.]

29 Before the Federal Power Commission

[Title omitted.]

Objection to the Intervention of the Secretary of the Interior and answer to his petition to intervene

To the Honorable the Federal Power Commission:

Virginia Electric and Power Company comes now to object to the intervention of the Secretary of the Interior in this matter and to answer his Petition to Intervene.

On October 6, 1948, Virginia Electric and Power Company filed application for a license under the Federal Power Act to construct, operate, and maintain a hydroelectric development on the Roanoke River near Roanoke Rapids, North Carolina.

On March 22, 1949, by order of this Commission this matter was set for public hearing in the Hearing Room of the Commission, Washington, D. C., on May 12, 1949, at 10:00 a. m. The issues upon which evidence was to be heard were set forth in the said Order of March 22, 1949, as follows:

30 "The applicant, the staff, and all others interested should be afforded an opportunity to present their views together with pertinent data relative to (1) the question of the Commission's authority under the Federal Power Act to entertain the application for license herein; (2) the question of whether the

development of the Roanoke Rapids site should be undertaken by the United States itself; and (3) the question of whether the plans proposed by the applicant for development of the Roanoke Rapids site are best adapted to a comprehensive plan for improving or developing the Roanoke River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; or, if such plans require modification, what modification is necessary in order to warrant approval under Section 10(a) of the Federal Power Act."

On April 1, 1949, the Secretary of the Interior filed his Petition to Intervene as a formal party. On April 11, 1949, Virginia Electric and Power Company filed its Answer to Petition to Intervene, as did the Commission's Staff on April 14, 1949. On April 15, 1949, the Secretary of the Interior filed a suggested order. On April 20, 1949, representatives of the Commission's Staff, the Secretary of the Interior and Virginia Electric and Power Company met informally before the Honorable Thomas C. Buchanan, Commissioner, and as a result of that conference the Secretary of the Interior withdrew all papers filed in his behalf and has now filed a new Petition to Intervene.

Virginia Electric and Power Company earnestly objects
31 to the intervention of the Secretary of the Interior, upon the grounds: (1) that the Secretary of the Interior has no interest herein; (2) that the interest which the Secretary of the Interior is attempting to assert is not the interest of the Department of the Interior, but is the interest of the United States which interest the Federal Power Commission is charged by law to protect and which interest it is not alleged that the Commission's Staff will not adequately represent; and (3) that the public interest will not be served by the intervention herein of the Secretary of the Interior. In support of these grounds Virginia Electric and Power Company respectfully asks that its Memorandum in Support of Answer to Petition to Intervene filed herein on April 11, 1949, be read in support of this Objection to the Intervention of the Secretary of the Interior and Answer to His Petition to Intervene as if it were filed herewith, since that Memorandum equally applies to the latest Petition to Intervene.

Since the memorandum in support of the Answer to the previous Petetion to Intervene was written, additional light has been shed upon the real intentions of the Secretary of the Interior and in view of this enlightenment Virginia Electric and Power Company believes some additional comment is pertinent.

32 The representative of the Secretary of the Interior who appeared informally before Commissioner Buchanan on April 20, 1949, came with a prepared memorandum. Although

he did not officially file this statement, copies were furnished counsel and all members of the Commission. The contents are illuminating and illustrate precisely why the Secretary of the Interior should not be admitted as a party to the proceeding. Thus, the memorandum states:

"In addition, if leave to intervene makes no difference, then the petition to intervene cannot be construed otherwise than a mark of courtesy on the part of the Secretary to the Commission, and the denial of the petition would constitute a rebuff to the Secretary.

"4. We think, however, that the difference between intervention and informal participation is very substantial.

"(a) Unless the Secretary is permitted to intervene and is made a party to the proceeding, he really has no standing to file a motion to dismiss or deny the application, which motion the Secretary indicated (in his letter of January 6, 1949), he would present at the appropriate time.

"(b) The Secretary may want to cross-examine the applicant's or Commission's witnesses.

"(c) Upon final decision of the matter in his favor, the Secretary may want to appear as a party in any appeal taken by the Virginia Electric and Power Company.

"(d) If the Commission's decision is against the Secretary, he may want to appeal from that decision to the Circuit Court of Appeals."

It is obvious that what the Secretary of the Interior is really trying to accomplish is a standing in this proceeding, to
33 which he is not entitled, but which he thinks will afford him opportunity to test as an adversary of this Commission the jurisdiction and function of this Commission. He is here not to aid but to prevent or at least to delay the functioning of the Commission, and he is asking that the Commission give him that opportunity.

While Virginia Electric and Power Company does not agree that the differences between intervention and informal participation are set forth by the Secretary of the Interior, the fact that the Secretary of the Interior believes he derives some standing therefrom and obviously intends to employ such standing as a basis for litigation is legitimate ground for denial of his Petition to Intervene.

The Federal Power Act clearly places the responsibility for final decision with respect to the interest of the United States solely upon the Federal Power Commission. That is the Commission's function. That is why it was created. Persons, whose interest is other than that of the United States have resourse in

appeal, if aggrieved. But, so far as the interest of the United States is concerned this Commission is the final arbiter.

No provision for Court review by an agency of the United States is contained in the Federal Power Act. Section 313 provides for Court review on the petition of any party to the
34 proceeding after a petition for rehearing has been filed with and denied by the Commission. But only a "person, State, municipality or State Commission aggrieved by an order of the Commission" may file an application for rehearing. Person is defined by § 3 (4) to mean "an individual or a corporation." Thus the Secretary of the Interior has no right of appeal under the Federal Power Act. The same result is reached under the Administrative Procedure Act. Section 10 (a) provides judicial review only for "persons" aggrieved. The definition of person, § 2 (b), expressly excludes agencies of the United States. It is clear therefore that the right of the Secretary of the Interior to secure judicial review of the actions of this Commission has no basis in the statutes.

Should the Secretary of the Interior be permitted to intervene formally, that fact would lend the apparent sanction of this Commission to his exercise of its functions and since litigation by another agency of the United States upon a matter which has been entrusted to this Commission has no sanction in law it should not be fostered by this Commission. Thus in Baltimore and Ohio R. Company v. United States, 264 U. S. 255 (1924) the Supreme Court of the United States said at page 268:

"Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. * * * The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest."

35 The Company submits that courtesy to the Secretary of the Interior does not permit this Commission to abdicate its functions. Humphrey's Executor v. United States, 295 U. S. 602, 628-630 (1935).

The Petition to Intervene sets forth no issues not ordered to be heard upon the merits by the Commission's order of March 22, 1949. Virginia Electric and Power Company denies that the position taken by the Secretary of the Interior with respect to these issues is meritorious or that the Secretary has any interest or standing to assert such position as a party herein and denies that the mere taking of such a position serves as a basis for his intervention.

The order of March 22, 1949, contemplates the presentation of the views of the Secretary of the Interior, but it is submitted that

no reason has been advanced to justify or permit his admission as a formal party.

Accordingly, Virginia Electric and Power Company objects to the intervention of the Secretary of the Interior and earnestly requests that his Petition to Intervene as a formal party hereto be denied.

Respectfully submitted.

VIRGINIA ELECTRIC AND POWER COMPANY,
By (Signed) T. Justin Moore,
T. JUSTIN MOORE,
By (Signed) Patrick A. Gibson,
PATRICK A. GIBSON,
By (Signed) Francis V. Lowden, Jr.,
FRANCIS V. LOWDEN, JR.,
1003 Electric Building, Richmond, Virginia,
Its Attorneys.

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE,
1003 Electric Building, Richmond 12, Virginia,
Of Counsel.

36 Verification (omitted in printing).
Certificate of service (omitted in printing).

39 Before the Federal Power Commission
[Title omitted.]

Petition to intervene

To the Honorable the Federal Power Commission:

Comes now Virginia REA Association, a corporation, and its interested members, Mecklenburg Electric Cooperative, Southside Electric Cooperative, Community Electric Cooperative, Prince George Electric Cooperative, Central Virginia Electric Cooperative, Virginia Electric Cooperative, Northern Neck Electric Cooperative, Northern Piedmont Electric Cooperative, Shenandoah Valley Electric Cooperative, B-A-R-C Electric Cooperative, and Craig-Botetourt Electric Cooperative, all corporations, and submit this Petition to Intervene in the matter referred to above, and as reasons for their intervention say:

I

(a) That petitioner, Virginia REA Association, is a non-stock membership corporation, not organized for profit, created and existing under the laws of the State of Virginia, with its principal office at Bowling Green, Virginia.

(b) That your other eleven petitioners are duly incorporated nonprofit membership electric cooperatives organized and existing under the Electric Cooperatives Act of the State of
40 Virginia, with their respective principal offices located as follows: Mecklenburg Electric Cooperative, Chase City, Virginia; Southside Electric Cooperative, Crewe, Virginia; Community Electric Cooperative, Suffolk, Virginia; Prince George Electric Cooperative, Waverly, Virginia; Central Virginia Electric Cooperative, Lovingston, Virginia; Virginia Electric Cooperative, Bowling Green, Virginia; Northern Neck Electric Cooperative, Warsaw, Virginia; Northern Piedmont Electric Cooperative, Culpeper, Virginia; Shenandoah Valley Electric Cooperative, Dayton, Virginia; B-A-R-C Electric Cooperative, Millsboro, Virginia; Craig-Botetourt Electric Cooperative, New Castle, Virginia.

II

That they have an interest in this matter, and that their interest is as follows:

(a) As set forth in its certificate of incorporation, petitioner, Virginia REA Association, was formed for the following purposes, among others:

"For the mutual aid and assistance of electric cooperatives organized under the provisions of the Electric Cooperatives Act of Virginia and similar or kindred laws of other States, and doing business in whole or in part, in Virginia; to foster and promote the program of rural electrification; to encourage the fullest possible use of electric energy at the lowest cost consistent with sound economy and prudent management; to develop the natural resources of the areas served by its members."

(b) Its membership includes the other eleven petitioners which unite with it herein, all of which, as stated, are electric cooperatives with corporate existence. Under its charter and bylaws it stands obligated to render aid and assistance to its mem-
41 bers, to foster and promote the program of rural electrification and to encourage the fullest possible use of electric energy in rural areas at the lowest cost consistent with sound economy and prudent management. It is interested in obtaining for its members an adequate supply of low cost power on reasonable terms and conditions and to that end to aid them in availing themselves of their statutory preferential right to power generated at public projects by the United States and marketed by the Secretary of the Interior. It is to its interest and the interest of is members that public power projects accessible to its members be developed and operated. The Roanoke Rapids project is such a project.

(c). The other eleven petitioners are nonprofit public service corporations, engaged in the business of distributing and selling electric power to some forty thousand consumers in rural areas at, around and at a distance from the location of their respective principal offices, many of which consumers reside within the Roanoke River basin. These nonprofit cooperative public service corporations are subject to the jurisdiction of the State Corporation Commission of Virginia in like manner as other public service corporations. They are financed through loans of public funds from the United States made through the Administrator of the Rural Electrification Administration and appropriated for the purpose by the Congress of the United States in recognition and realization of the failure of the power companies to electrify the rural areas of America.

(d) There is now under construction the Buggs Island
42 project on the Roanoke River upstream from the Roanoke Rapids, and under the provisions of section 5 of the Flood Control Act of 1944 (58 Stat. 887, Public Law 534 of the 78th Congress, 2nd Session), the power from such project is to be transmitted and disposed of by the Secretary of the Interior in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers, consistent with sound business principles, the rate schedule to become effective upon the confirmation and approval by the Federal Power Commission. It is expressly provided: "Preference in the sale of such power and energy shall be given to public bodies and cooperatives." Under this law the eleven petitioning cooperatives have, along with other cooperatives, a prior and preferred right to the power generated at said project and all other public power projects in the Roanoke River basin, superior to the applicant and all others, save public bodies and of equal dignity with such public bodies.

(e) While the Buggs Island project will generate a considerable amount of firm power, it is a multipurpose reservoir of great height and is designed principally for the accumulation, storage and control of the waters of such river necessitating the flooding of large areas upstream, with the result that the cost of the said project in relation to the power generated will be much greater than a downstream power project such as Roanoke Rapids enjoying the steady stream flow made possible by this large storage reservoir. On the other hand, the Roanoke Rapids project is
primarily a power development, requiring only a low dam
43 and comparatively little flooding of upstream areas and enjoying the benefit of a steady stream flow made possible by the Buggs Island project constructed by and at the expense of the United States. The result is that power can be generated much more cheaply at Roanoke Rapids than at Buggs Island.

Consequently, it is to the interest of petitioners and their consumers that the United States construct both the Buggs Island and the Roanoke Rapids projects, and grant to said cooperatives the preference rights to which they are entitled under the law, marketing said power at rates based on the total cost incurred by the United States, by reason whereof the rates which the eleven petitioning cooperatives will be required to pay for the power generated as aforesaid will be greatly reduced. Said cooperatives and their service areas are so located that they can economically use said power from both projects, and some of them are located directly within the Roanoke River basin.

(f) All eleven petitioning cooperatives are both consumers and distributors of power, and were organized and function for the purpose of making electric service available in rural areas at the lowest rates consistent with sound economy and prudent management, thereby raising the standard of living of rural inhabitants; and to that end it is essential that they acquire power at the lowest possible cost. In addition, all of them are competitors of the applicant, Virginia Electric and Power Company, and are engaged in selling electric energy to the consumers in rural areas in portions of the same general territory in which the applicant operates. All of them have an interest which will be directly, substantially and adversely affected by the granting of the license applied for and said interest is not adequately represented
44 by existing parties now before the Commission in this matter.

(g) Each of the eleven petitioning cooperatives has a right conferred by statute of the United States to preference in the distribution and sale of power to be generated at said projects.

III

The interest of petitioners and each of them will, as stated, be directly, substantially and adversely affected by the granting to the applicant of the license to construct the Roanoke Rapids project for the reasons hereinbefore set forth in stating the interest of petitioners.

IV

The position of the petitioners is as follows:

(a) The application of Virginia Electric and Power Company for the granting of such license should be dismissed because:

(1) The Roanoke Rapids site has been reserved by Congress for development by the United States, and the Federal Power Commission is without jurisdiction to entertain such application:

(2) The Federal Power Commission, having concurred in the recommendation of the Corps of Engineers that the Roanoke

River basin, including the Roanoke Rapids project, be developed by the United States, cannot now entertain the pending application, the effect of which would be to reverse the previous determination made by the Commission and set at naught the determination then made.

(b) If the Commission has jurisdiction to entertain the application, it should be denied because the granting of the license to the applicant for the Roanoke Rapids project will:

45 (1) Detrimentally affect the development of the Roanoke River basin already undertaken by the United States and render nonfeasible the development of certain of the projects incorporated in the approved plan for the development of the basin.

(2) Operate to surrender and give away power benefits of great proportions which should be reserved by the United States for the benefit of consumers, and result, in effect, in the applicant being permitted to pick up and keep as its own the apples which the United States has, at great cost, shaken from the tree.

(3) Contravene the public interest.

(4) Adversely affect the preferential rights of public bodies and cooperatives to the power generated at the Buggs Island project and at other approved sites in the Roanoke River Basin.

Wherefore it is respectfully submitted that these petitioners have a sufficient interest to warrant their intervention in this matter and that this petition to intervene should be granted.

Petitioners realize that this petition was not filed within ten days prior to the date set for the beginning of the hearing, namely, May 12, 1949. However, they represent that good and sufficient cause exists for such delay.

Virginia REA Association holds four meetings per year, namely, in January, April, July, and October. This matter had not been set for hearing when the January 1949 meeting was held. The next meeting began on April 26, 1949, and on April 28, 1949, the following resolution was adopted:

"Whereas, application has been filed by Virginia Electric
46 and Power Company for authority to construct and develop a part of the Roanoke River Basin: viz, the Roanoke Rapids Dam, being a part of the over-all project approved by Congress for development, and

"Whereas, the interests of existing REA Cooperatives and its members would be adversely affected by granting such a license,

"Now therefore, we deem it important and advisable that our Committee be instructed, through our Attorney, to file application for intervention in the case."

The substance of this resolution was communicated to Robert Whitehead, its attorney, over the phone on April 30, 1949. He

immediately began work on the undertaking, but did not have sufficient time within which to make a complete study of the situation and prepare and file the petition for intervention on behalf of his clients by May 2, 1949.

Respectfully submitted.

VIRGINIA REA ASSOCIATION,
MECKLENBURG ELECTRIC COOPERATIVE,
SOUTHSIDE ELECTRIC COOPERATIVE,
COMMUNITY ELECTRIC COOPERATIVE,
PRINCE GEORGE ELECTRIC COOPERATIVE,
CENTRAL VIRGINIA ELECTRIC COOPERATIVE,
VIRGINIA ELECTRIC COOPERATIVE,
NORTHERN NECK ELECTRIC COOPERATIVE,
NORTHERN PIEDMONT ELECTRIC COOPERATIVE,
SHENANDOAH VALLEY ELECTRIC COOPERATIVE,
B-A-R-C ELECTRIC COOPERATIVE,
CRAIG-BOTETOURT ELECTRIC COOPERATIVE,

By (S) Robert Whitehead,
ROBERT WHITEHEAD,
Lovingston, Virginia, Its Attorney.

WHITEHEAD AND MARSHALL,
Lovirgston, Virginia,
Of Counsel.

47 Verification (omitted in printing).

48 Certificate of service (omitted in printing).

51 Before the Federal Power Commission

[Title omitted.]

Answer of Commission staff in opposition to petition to intervene

Comes now the Staff of the Federal Power Commission by its Counsel, and submits this Answer in Opposition to the Petition to Intervene, filed on April 25, 1949, by the Secretary of the Interior, in the matter of Virginia Electric and Power Company's application for license for Project No. 2009, otherwise known as the Roanoke Rapids Project.

The grounds for opposition to the petition are as follows:

1. As head of an executive Department, Petitioner represents the United States in filing this petition, and could only represent the United States in a proceeding before the Commission, whether or not he is admitted as a formal intervener. The United States is already a full party to this proceeding, and is represented by

the Commission, which is the only agency of the Government empowered by Congress to represent it in a licensing proceeding instituted under the provisions of the Federal Power Act.

52 2. The only real purpose Petitioner can have in seeking status as a formal intervener in this proceeding is so that in the event the Commission issues an order by which he may consider himself aggrieved, he may seek court review of such order under the provisions of Section 313 (b), under the aegis of the Commission's order granting him status as an intervener. This purpose of Petitioner is abundantly clear under the circumstances, because the Commission has customarily proferred to all Government agencies every right of participation in proceedings before it without the requirement that any agency first acquire status as an intervener. Congress, has in some cases, provided that one agency may intervene in the proceedings of another, and if aggrieved may seek judicial review. Especially is this so, where two agencies exercise dual control of or have a dual interest in the subject matter to be regulated. Congressional authority to grant licenses for power projects in the navigable waters of the United States was delegated by Congress to the Federal Power Commission, and no provision was made by Congress in the Federal Power Act or in any other statute which gives a right to any other agency of the Government to in-

53 tervene in the Commission's proceedings or to seek review of the Commission's orders. Had Congress desired such duality of control or influence in the matter of licensing, Petitioner would have been expressly authorized to intervene in proceedings before the Commission and no petition to intervene would have been necessary.

3. Even if Petitioner is permitted to intervene in proceedings before the Commission, there is grave doubt as to whether the Petitioner could qualify as a "person aggrieved" under the section of the statute providing for review. In the absence of a directive by Congress, the Commission should take no action which, by giving nominal status to Petitioner as a party, might have a tendency to influence a court in passing upon its authority to grant review, thereby possibly encouraging litigation involving the sovereign against itself. If agencies of the United States are to be permitted to question the jurisdiction of this Commission in the courts, such permission must come from Congress.

Memorandum in Support of Staff's Answer

Council for the Petitioner approached the question of the Petitioner's intervention as though such intervention should be permitted as a matter of course. In Docket No. G-123, General

54 Gas Pipe Line Corporation, 2 FPC 581, the Commission denied intervention when sought by the Bituminous Coal Division of the Department of the Interior, and in Docket No. G-165, Tennessee Gas & Transmission Company, 2 FPC 802, this Division of the Department of the Interior again was denied the status of formal intervener in a Commission proceeding. In both cases, the petitions were filed by the Department's General Counsel, and stated that the petitioner desired to "participate in said proceeding in a nonlitigious manner and to render helpful assistance to the Power Commission in developing of record relevant and material evidence germane to the issues to be adjudicated." The Commission, passing on both petitions, did not indicate that the petitioner had failed to show an interest, but found that participation by this Division of the Department of the Interior as a party and intervener had not been shown to be necessary. The privilege of participation in those proceedings was accorded the petitioner in each instance. We submit that in view of these two actions by this Commission, any claim or inference that the Secretary of the Interior is entitled to intervene in Commission proceedings as a matter of course, lacks merit.

The Staff's opposition to the Petitioner's intervention as a formal party in this matter is not predicated upon any desire to have the Commission withhold any privilege or right the Petitioner may have, as a matter of comity, to participate in this proceeding before the Commission, and we have consistently recommended that the petitioner be fully recognized as a par-
55 ticipant. However, since the petition obviously is filed for the sole purpose of obtaining some sort of imprimatur by the Commission to provide basis for possible institution of a review proceeding in a court—the staff urges the Commission to give thought to the rather unusual implications of its permission, if given. The Petitioner is not a "person" under the Act, nor does he fit within any other classification set forth in Section 313 of the Act under which court review must be sought. The question would seem to be whether or not the Commission desires to recognize the Petitioner in such a way as to provide basis for possible review of orders which may be issued in this proceeding, and thereby engender or encourage a review not otherwise provided by statute.

In the Chicago Junction Case 264 U. S. 258, 267-269, the Supreme Court said: "No case has been found in which this court or any lower court has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein." Of course, the mere fact of intervention does not give a right to review (Pittsburgh & W. Va. Ry. Co. v. United States, 281 U. S. 249, 255, 257) but under the present circumstances

the allowance of intervention might be deemed persuasive notwithstanding the intention of the Commission not to pass upon the right of the Secretary to court review.

The Secretary does not file his petition in his personal but in his official capacity. He speaks for the United States in many circumstances. A suit against the Secretary of the Interior
56 in his official capacity is a suit against the United States (Naganab v. Hitchcock, 202 U. S. 473; Louisiana v. Garfield, 211 U. S. 70). Conversely, any official act by a Department head is presumed to be the act of the President (Runkle v. United States, 122 U. S. 543; United States v. Farden, 99 U. S. 10; Hegler v. Faulkner, 153 U. S. 109) and thus an act of the sovereign. Hence, the Commission must consider the Petitioner in this case as a duly constituted representative of the sovereign and the question of whether or not intervention should be granted must be determined with all of the implications in mind which would arise from the granting of intervention.

One question which the Commission must face is whether it is authorized under the statute to either surrender its responsibilities or to share them with the Secretary as now proposed. Either surrender or sharing of responsibility would not be permissible unless expressly authorized by an Act of Congress. The Supreme Court said, in United States v. Cooper Corporation, 312 U. S. 600, on pages 604 and 605:

"Since in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent by the use of the term to bring state or nation within the scope of the law" (citing cases).

57 And on page 606:

"Without going beyond the words of the section, the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States 'the ordinary dignities of speech would have led' to its mention by name" (citing Davis v. Pringle, 268 U. S. 315, 318).

"The connotation of a term in one portion of an Act may often be clarified by its use in others."

The Court concluded:

"In summary, we are of the opinion that the text of the Act, taken in its natural and ordinary sense, makes against the extension of the term 'person' to include the United States and that the usual aids to construction, taken together, instead of inducing a

contrary conclusion, go to support the view that Congress did not use the word in the sense for which the Government contends."

See also, United States v. United Mine Workers of America, 330 U. S. 258, 269–284 and United States v. Fox, 94 U. S. 315, 321.

The Federal Power Act does not require the interpretation that the United States is a "person" within the meaning of that statute, but on the contrary it appears to be clear from the context of the Act that the United States is not included in the term "person." In addition to the bare definition of "person" in Section 3 (4) of the Act which says that "person" means an individual or a corporation, the word "person" is used in Section 23 (b) of Part I of the Act, and if the Petitioner is a "person" as contended in the petition, there might be some question as to whether or not some of the projects operated and maintained by the Secretary of the Interior require licenses under the Federal Power Act under
58 Section 23 (b). Are the rates for power sold by the Secretary subject to Commission supervision under Section 19 merely because that section refers to sales by a "person"? Also, if the word "person" includes the Secretary, would he suggest that the Commission could bring an action against him under the provisions of Section 314 (a) and that the courts would have jurisdiction to issue process against him under Section 314 (b)? Or would the Secretary suggest that he would be subject to penalties provided in Section 316, including, presumably fine and imprisonment, as other "persons" to whom the statute is clearly applicable?

No one would argue, nor do we, that the Secretary, acting in his official capacity, is subject to all of the provisions of the Act wherein the term "person" is used.[1] It would seem to follow, therefore, under one test of interpretation set forth in the Cooper case, supra, the context of the Federal Power Act not only does not require the interpretation that the Secretary is a "person" but a logical interpretation of the Act requires a conclusion that Congress did not intend to include the sovereign United States or any agency thereof as a "person" when that statute was enacted.

The Secretary, obviously not being amenable to the Act as a "person" (or in any other classification) it would seem to follow that he should not be permitted to intervene as a formal party solely as a basis for possible court review of any orders
59 issued in this proceeding. If the Commission should grant him the status of formal intervener under its rules, there is grave doubt as to whether this action by the Commission, as such,

[1] Part II of the Act does not apply to the United States or any agency thereof (Sec. 201 (f)). Agencies of the United States engaged in the sale of power are subject to certain provisions of Part III (Sec. 303).

could entitle the Secretary to seek review of any Commission order as a "person aggrieved". For even if the Commission were to treat the Secretary as a "person"—distinct and apart from the sovereign he represents—in its own proceedings, any court wherein he would seek review of an order must necessarily first determine his status before hearing his petition for such review. Differences of opinion between Government agencies as to scope of jurisdiction are not decided in the courts in this way, unless Congress by appropriate legislation has given authority to an agency to intervene in the proceedings before another.[2] Petitioner, however, does not and can not base his petition upon any right to intervene given to him by statute. Obviously, if such statutory right existed, a formal petition to intervene by this petitioner would be unnecessary.

CONCLUSION

The staff urges that the Commission deny formal intervention by Petitioner but that the Petitioner's privilege of participation in the Commission's proceedings on this matter be recognized.

We attach a modification of the order suggested in our
60 Answer to the Petitioner's first petition filed on April 4, 1949, and answered by the Staff on April 14, 1949.

Respectfully submitted.

WILLARD W. GATCHELL,
Assistant General Counsel,
WILLIAM J. COSTELLO,
Attorney,
Staff Counsel.

WASHINGTON, D. C., *May 5, 1949.*

61 *Appendix*

SUGGESTED ORDER

[Title omitted.]

ORDER DENYING PETITION TO INTERVENE AND RECOGNIZING PRIVILEGE OF PARTICIPATION

On April 4, 1949, Julius A. Krug, Secretary of the Interior, filed, by his counsel, a formal petition under the Commission's General Rules, praying that, as head of one of the executive departments of the United States Government, he be permitted to

[2] *Cf. McLean Trucking Co. v. United States*, 321 U. S. 67; *I. C. C. et al. v. Inland Waterways Corp., et al.*, 319 U. S. 515, *I. C. C. v. Jersey City*, 322 U. S. 503; *North Carolina v. United States*, 325 U. S. 507.

intervene in the above-entitled matter. The petition alleged that petitioner has an interest in this matter and that his official rights and powers would be substantially and adversely affected by the grant of a license to the applicant to construct a hydroelectric power project at Roanoke Rapids on the Roanoke River in North Carolina. This petition was answered by the applicant and by the staff. On April 25, 1949, the petition filed on April , 1949, together with a supplement thereto filed on April 15, 1949, was withdrawn by petitioner's counsel, and a revised petition seeking intervention was filed. In general, the second petition reiterated the grounds for intervention set forth in the first, but added as a basis for intervention a claim previously asserted by the Secretary in a letter to the Commission dated January 6, 1949, that Congress has by law set aside the Roanoke Rapids Site for development by the United States and that in view of such Congressional action, the Commission lacks jurisdiction to authorize or issue any license under the Act for private development of the site in question. The second petition was answered by the applicant and by the staff, both urging again that formal status as an intervener be denied the petitioner. The staff, however, has consistently urged that every privilege of participation in the proceeding before the Commission be accorded the petitioner, so that the Commission may have the full benefit of petitioner's views and the assistance of the petitioner and his staff in implementing the licensing provisions of the Federal Power Act.

The Commission finds:

(A) Any executive officer, department, or agency of the Federal Government may assist the Commission in the protection of the public interest and in the discharge of the duties delegated by Congress to the Commission under the provisions of the Federal Power Act by participating in any proceeding before
62 the Commission arising under Part I of the Act, and the granting of status as a formal party or intervener to proceedings is not necessary to give officers, departments, or agencies of the United States the privilege of assisting the Commission by participation in its proceedings.

(B) Formal intervention in this proceeding by the petitioner has not been shown to be necessary in order to protect the public interest.

The Commission orders:

The petition of the Secretary of the Interior to intervene as a formal party in the above-entitled proceeding is hereby denied; provided, however, that nothing herein shall be construed as curtailing or as otherwise affecting the privilege of the Secretary of the Interior, as head of one of the executive departments of the United States Government, to introduce evidence relevant and

material to the issues in the proceeding as set forth in the Commission's order of March 22, 1949, to make oral argument, and to file briefs; and provided, further, that this recognition by the Commission of the privilege of participation shall not be construed as recognition of the petitioner as a person or party as those terms are used in the Federal Power Act or that petitioner might be aggrieved by any order of the Commission issued in this proceeding.

63 Certificate of service (omitted in printing).

65 Before the Federal Power Commission

[Title omitted.]

Reply to opposition of Staff counsel and Applicant to the petition of the Secretary of the Interior to intervene

To the Honorable the Federal Power Commission:

Staff counsel and the Virginia Electric and Power Company (hereinafter referred to as "Applicant") filed their statements in opposition to the petition of the Secretary of the Interior (hereinafter referred to as "Secretary") to intervene in this proceeding. Their opposition may be summarized in the following propositions:

1. The Secretary has no interest in the proceeding, and the public interest would not be served by his intervention.

2. The Secretary's interest is that of the United States, and it is the Commission's sole responsibility to protect that interest.

3. The Secretary would have no standing to appeal from any order of the Commission, and, therefore, should not be given the standing of a formal party.

These objections are discussed below.

I

The Secretary's petition to intervene sets forth the facts and reasons for his intervention. It is evident from the state-
66 ments in the petition that he has an interest in this proceeding and that his intervention would be in the public interest.

II

It cannot be gainsaid that it is the function and duty of the Federal Power Commission to protect the interest of the United States in this proceeding. This is clear from the provisions of the Federal Power Act. For example, that statute provides that licenses for projects shall be granted to promote the public, rather than private, interest (section 4 (e)). Notable also are the pro-

visions that a license may be granted for a period not exceeding fifty years (section 6) and that at the end of that period the project is subject to recapture by the Government (section 14). And, of course, section 7 (b), prohibiting the approval of any application for any project affecting any development which in the judgment of the Commission should be undertaken by the United States, necessarily implies that it is the function and duty of the Commission to protect both the proprietary and sovereign interests of the United States.

There is no provision in the Federal Power Act, however, declaring that the Commission is the sole or exclusive agency charged with the function and duty to protect the public interest in the water resources of the Nation or the interest of the United States in any of the developments. Other statutes may impose similar duties upon other officers or agencies of the Government.

Where, as in section 5 of the Flood Control Act of 1944 (58
67 Stat. 887, 16 U. S. C., 1946 ed., sec. 825s), Congress imposes functions and duties upon the Secretary of the Interior to dispose of the power and energy generated at reservoir projects under the control of the Department of the Army, it becomes his right and duty to safeguard the interests of the United States in that regard. This requirement to safeguard and protect the interests of the United States may take on different forms from time to time, depending on facts and circumstances.

When an application is filed for a license to construct a project at a site which the Secretary, in the discharge of his duties, asserts has been or should be reserved for a project of the Department of the Army with which he is concerned by virtue of section 5 of the Flood Control Act of 1944, he is authorized to protect and safeguard such interest before the Federal Power Commission. The position of the Secretary is equivalent to that of a private person who claims a prior or paramount right to the project site and who files a petition to intervene in a proceeding before the Commission. In such circumstances, if a private person had petitioned for leave to intervene, the petition would have been granted as a matter of right. There is no reason why the Secretary of the Interior should be put in a position of lesser importance than that of a private person.

The Secretary's appearance in such a proceeding before the Commission does not spell any conflict between these two agencies of the Federal Government. On the contrary, the adversary character of the proceeding takes on the aspect of a conflict
68 between the Applicant and the Secretary, with the Commission acting as the impartial tribunal to determine which of the conflicting alternatives presented would better serve the public interest.

The Applicant seems to argue that, by admitting the Secretary as a party in the proceeding, the Commission would abdicate its functions. There is no more merit to this contention than there would be in an assertion that when a court grants permission to a party to intervene, it abdicates its judicial functions to the intervenor.

The Applicant also asserts that the petition for intervention is defective because it fails to allege that the Commission's staff would not adequately represent the interest of the United States. We do not find ourselves on the two horns of the dilemma furnished by the Applicant: that if the staff adequately represents the interest of the United States, the Secretary has no reason to intervene; whereas if he desires to intervene, he must first charge the Commission's staff with dereliction of duty.

There is no rule of thumb determining what constitutes the public interest. In these difficult questions of law and fact, there is always room for honest differences of opinion as to what is best in the public interest. So it is possible, when the Secretary of the Interior intervenes in a proceeding of this character, for the staff to take the position that the Commission should rule in favor of the Applicant, rather than in accord with what they may consider to be the mistaken views of the Secretary. This possibility,
69 however, is not an argument against the proposition that the Secretary is a proper or necessary party in the proceeding. On the contrary, it emphasizes the importance of his intervention, for without his presence in the case, with ability to avail himself of every opportunity to protect the interest of the United States as he sees it, the proceeding may, in important aspects, become ex parte, with both the Applicant and the Commission's staff on one side of the questions presented. And if it should so happen that the staff's position is erroneous (a failing to which all humans are occasionally subject), then the public interest would not have been adequately represented.

In view of this possibility, the Commission should welcome the Secretary's appearance as a party for the purpose of assisting the Commission in its functions and duty to protect the interest of the United States.

Staff counsel refer to two cases: In re General Gas Pipeline Corporation, 2 F. P. C. 581, and In re Tennessee Gas and Transmission Company, 2 F. P. C. 802, in which the Bituminous Coal Division of the Department of the Interior had filed petitions to intervene, and the petitions were denied. As staff counsel point out, in both cases the petitioner desired to participate in the proceeding in "a non-litigious manner and to render helpful assistance to the Power Commission in developing of record relevant and material evidence germane to the issues to be adjudicated."

There, the Commission properly held that participation by the Bituminous Coal Division of the Department as a party and
70 intervenor for the purpose stated had not been shown to be necessary, but the privilege of participation in those proceedings was accorded. Here, however, the Secretary has fully indicated his desire to participate fully as a party in the proceeding, with standing equal, not inferior, to that of his adversary, the Virginia Electric and Power Company. Therefore, the cases cited by staff counsel are not apposite, and furnish no reason for the denial of the Secretary's petition.

III

Staff counsel and the Applicant take the view that the petition for intervention should be denied in order to defeat beforehand any claim of right to appeal that the Secretary might desire to assert in the event of an adverse decision by the Commission. To this end, they weave an argument that the Secretary would have no right of appeal under section 313 (b) of the Federal Power Act because it would first be necessary for him to file an application for a rehearing under section 313 (a) of the act; that only a person may file such application; and that the Secretary is not a person, within the meaning of the act. We do not feel called upon to answer in detail the spurious discussions in support of this argument. In not a single case they cited, has it ever been said that a public officer is not a person. The Secretary is a person in fact, and our law has not so far strayed from realities as to fail to recognize a fact so obvious.

However, with all that has been said on this matter by staff counsel and the Applicant, it is evident that whether the
71 Secretary, if a party to the proceeding, would or would not have standing to seek judicial review of an order of the Commission is not a question which the Commission can determine. Intervention before the Commission would not of itself create such right. Moffat Tunnel League v. United States, 289 U. S. 113. Consequently, consideration of that point should not have any influence upon the Commission in passing upon the Secretary's petition to intervene for the purpose of protecting his statutory interest in this matter.

Respectfully submitted.

Mastin G. White,
MASTIN G. WHITE,
Solicitor of the Department of the Interior.

Gregory Hankin,
GREGORY HANKIN,
Of Counsel.

72 Certificate of service (omitted in printing).

74 Before the Federal Power Commission
[Title omitted.]

Answer of Virginia Electric and Power Company in opposition to petition to intervene and motion to reconsider the Commission's order adopted May 6, 1949, permitting the intervention of Virginia REA Association

To the Honorable the Federal Power Commission:

Virginia Electric and Power Company comes now to object to the intervention of Virginia REA Association, to answer its Petition to Intervene and to move for reconsideration of the Commission's order permitting the intervention of Virginia REA Association.

On May 5, 1949, Virginia REA Association filed its Petition to Intervene herein. A copy of said petition was received by Virginia Electric and Power Company the same day. Virginia Electric and Power Company understood that it had ten days from the date of filing of said petition to answer the same except that because this matter is already set for hearing the answer could not be filed within five days prior to the hearing date, May 12, 1949. Virginia Electric and Power Company intended to file its answer and objection to the Petition to Intervene within the time requirements of the Commission's rules.

75 However, Virginia Electric and Power Company was notified on May 6, 1949, that because the time for hearing was so close at hand the Commission had determined it necessary to rule upon the Petition to Intervene without benefit of Virginia Electric and Power Company's answer.

Virginia Electric and Power Company earnestly objects to the intervention of Virginia REA Association and is therefore filing this its Answer to the said Petition to Intervene and respectfully requests that the Commission reconsider its order adopted May 6, 1949, permitting the intervention of Virginia REA Association.

Virginia REA Association sought to intervene upon the ground that it has an interest in this matter which would not be adequately represented by any of the existing parties to the proceeding. Virginia Electric and Power Company denies that Virginia REA Association has any interest in this matter and that assuming for the sake of argument that it does have an interest such interest as it may have is adequately represented by existing parties to this proceeding.

The claimed interest of Virginia REA Association is based solely upon the provisions of Section 5 of the Flood Control Act of 1944. In substance the argument is that Virginia REA Association has an interest because should the United States eve-

construct the Roanoke Rapids Project it, the Virginia REA Association, might be a potential customer of the power produced since it is afforded certain preferences under Section 5 of the
76 Flood Control Act of 1944.

Examination of the history of the flood control program of the United States shows that the first comprehensive Flood Control Act was enacted in 1936, followed by the Acts of 1938 and 1941. It was not until the Act of 1944 that Section 5 became law. It is obvious from this chronology that the provisions of Section 5 could not have been the objects which the flood control program was designed to accomplish, but are only the incidental results after the program had been decided upon and was partially completed.

Representative Will M. Whittington, Chairman of the Flood Control Committee of the House of Representatives, stated the situation in 1944 on the floor of the House while urging passage of the Flood Control Act of 1944, as follows:

"* * * In some of these reservoirs that are authorized to be constructed there is a generation of power. The concrete proposition that confronted our committee was this: Shall we authorize these projects where power is incidental and make no provision for the disposal of it, or should we leave it to the President of the United States to set up an executive authority as he has done in Arkansas, Texas, and Oklahoma?"

The intendment of Section 5 of the Flood Control Act of 1944 is also set forth in a Report of the Committee on Commerce of the United States Senate,[3] as follows:

77 "AMENDMENT NO. 6

"On page 3, line 10, insert a new section as follows:

"Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval of the Federal Power Commission. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized to construct and acquire only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale

[3] Sen. Rep. No. 1030, 78th Cong., 2d Sess. (1944).

on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies.

"Amendment 6 authorizes the Secretary of the Interior to dispose of electric power generated at reservoir projects under the control of the War Department.

"Existing authority for flood-control projects and the authority contemplated in H. R. 4485 provides for a number of multiple-purpose dam and reservoir projects where large blocks of hydroelectric power will be produced but there is at the present time no general law governing the sale and distribution of power generated at projects under the control of the War Department. In order to attain the greatest benefit to the general public from this hydroelectric power, the time has come to place by law the responsibility for disposal of such power in an existing Federal agency. In the Bonneville Power Administration Act and the Fort Peck Power Administration Act, Congress has authorized the Secretary of the Interior to dispose of the power generated at the Bonneville and Fort Peck projects. More recently, under Executive Order No. 9366, the Secretary of the Interior has been made responsible for the disposal of power from the Denison and Norfork projects.

"The committee has heard testimony from the Secretary of the Interior and from the Director of the Division of Power of the Department of the Interior on this subject. The latter official has informed the Committee that the provisions of Amendment No. 6 contain sufficient authority and latitude for efficient administration and will satisfactorily enable the Department of the
78 Interior to carry out the intent of the amendment. The committee desires an amendment which provides a convenient and practical method of disposing of power at projects under the control of the War Department without setting up a public power trust which would be unduly competitive with established private power utilities. The committee, therefore, has inserted a proviso which authorizes the Secretary of the Interior to construct and acquire only such tranmission lines or related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. The committee recognizes the desirability of granting preferences in the sale of such power and energy to public bodies and cooperatives when the power is generated at projects financed by the Federal Government."

It is, thus, apparent that Section 5 is not intended to be operative unless and until the decision has been made by the Government to construct a dam, the dam is constructed, and excess energy

is, in fact, generated. This proceeding is concerned only with the preliminaries to the decision that the United States should or should not construct the dam. Whether or not a potential purchaser of power might obtain certain preferences in the event of Federal construction certainly is not a factor bearing on the decision of the question before this Commission. The interest which is controlling is whether or not the public interest generally will be benefitted by Federal construction, not whether a possible purchaser of power would be benefitted.

The preferences provided in Section 5 are not intended to and do not afford any test to determine whether or not it is in the public interest that a project be constructed by the United
79 States or by a private applicant. Those statutory preferences apply only to govern sale of the power if that decision is made. Virginia REA Association has, therefore, no interest which, within the meaning of the statutes, can enter into determination of the question whether it is in the public interest that the Roanoke Rapids site be withheld for possible future Federal construction or opened to licensed corporation by the applicant now.

In short, Section 5 of the Flood Control Act has no bearing on the question to be determined by the Commission under Section 7 (b) of the Federal Power Act, and a possible beneficiary of Section 5 has no interest in an issue before the Commission under Section 7 (b).

Virginia REA Association can here be in no position different from that of any other potential consumer, making the claim that power will be cheaper by Federal than by private construction. The statutory perference can afford no further interest because it creates no claim to or guide upon construction, but arises only when the issue as to construction is decided on its own merits.

For intervention as any other consumer, surely there can be no admissible private interest to be heard to advance any claim that it lies in the public interest to spend public money to create allegedly cheaper power for consumption by the intervenor than may be created by a privately owned and publicly regulated utility seeking to develop hydroelectric resources conform-
80 ably to government approval. All such a consumer can be interested in is rate regulation.

The Rule of the Commission purusant to which Virginia REA Association seeks to intervene sets forth the criteria for intervention as follows:

"Section 1.8 (b) *Who May Petition:*

"A Petition to Intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the Statute

under which the proceeding is brought. Such right or interest may be:

* * * * * * *

"(2) *An interest which may be directly affected and which is not adequately represented by existing parties* and as to which petitioners may be bound by the Commission's action in the proceeding * * *"

Virginia Electric and Power Company submits that the Petition to Intervene fails to comply with the rule of the Commission since the claimed interest, remote and speculative as it is, cannot be deemed to be directly affected by any action of the Commission.

It is clear that the intervention of Virginia REA Association as a party is neither necessary nor appropriate and should be denied. On the other hand the Commission may desire to have the views of the Petitioner. If so, Virginia Electric and Power Company suggests that this can be accomplished by a limited participation of the Petitioner without its formal intervention as a party hereto. Therefore, Virginia Electric and Power
81 Company respectfully moves the Commission to reconsider its order adopted May 6, 1949, and asks that Virginia REA Association be not given the status of a party, but, at most, that of a limited participant in the same manner and to the same extent as that permitted to the Secretary of the Interior by the Commission's order herein.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY,

By (Signed) T. Justin Moore,
T. JUSTIN MOORE,

(Signed) Patrick A. Gibson,
PATRICK A. GIBSON,

(Signed) Francis V. Lowden, Jr.,
FRANCIS V. LOWDEN, Jr.,

1003 Electric Building, Richmond, Virginia,
Its Attorneys.

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE,
1003 Electric Building, Richmond 12, Virginia,
Of Counsel.

82 Verification (omitted in printing).

Certificate of service (omitted in printing).

85 Before the Federal Power Commission

[Title omitted.]

Application for reconsideration

Comes now the Secretary of the Interior and respectfully requests this Honorable Commission to reconsider its order dated May 6, 1949, denying him leave to intervene as a formal party in this proceeding.

As grounds for this application, the Secretary assigns that:

(1) he has statutory rights and interests under section 5 of the Flood Control Act of 1944 which require protection in this proceeding; and

(2) he is charged by law to protect certain interests of the United States and of the public, and these interests will not be adequately represented by the existing parties.

I

The first ground is in the nature of an assignment of error.

The petition for leave to intervene described the Secretary's rights and interests that are involved in this proceeding and the manner in which they would be affected if the application for license were granted. To avoid repetition, the facts and reasons stated in the petition for leave to intervene are incorporated in this application by reference, as if fully stated herein.

86 II

The second ground is in the nature of newly discovered evidence.

In the statement in opposition to the [illegible]'s petition for leave to intervene, the applicant pointed out the absence of any allegation by the Secretary that the interests of the United States and of the public would not be adequately protected by the Commission's staff. Of course, there would have been no basis for such an allegation as of the time of the filing of the Secretary's petition.

In the course of the hearing before the Examiner, however, it has developed that the Commission's staff was convinced before the hearing began that the interests of the applicant and those of the United States were substantially identical and that the application should be granted. The staff has pursued a course entirely in support of the applicant and its interests, in opposition to the Virginia REA Association and the interests of its members, in opposition to the Secretary of the Interior, and in opposition

to the interests of the United States and of the public except as they coincide with those of the applicant. The transcript of the hearing is replete with illustrations supporting this allegation.

The staff's position has been entirely in favor of the applicant (Tr. pp. 24–5, 564–5) and against the Secretary (Tr. pp. 74, 178). Its interpretations of the statutes have been entirely in favor of the applicant and against the United States (Tr. pp. 26–8, 29–30, 32, Exhibit 11).

The staff's arguments and objections on questions of evidence have all been in favor of the applicant and against the
87 Virginia REA Association or the Secretary (Tr. pp. 281, 319, 329, 345, 349, 351, 354–6, 412–3, 425, 430–1, 471, 520–1, 848, 879–81, 900, 904–5), even to the point of seeking to exclude a letter written by the Administrator of the REA on the ground that there was no opportunity for cross-examination, whereas the staff itself had previously introduced letters written by the Chief of Engineers without such opportunity for cross-examination (Tr. pp. 955–7), and even to the extent of objecting to oral testimony embodying a statement of policy by the President of the United States (Tr. p. 940).

On the purported cross-examination of the applicant's witnesses, the questions asked by staff counsel were not in fact cross-examination, but were in furtherance of the applicant's testimony (Tr. pp. 303, 363–5, 382–5, 436, 486–92, 503–4, 531–3), but the staff vigorously and fully cross-examined the witnesses for the Secretary of the Interior (Tr. pp. 1183–1271, 1301–1371, 1441–1454, 1505–1508, 1514–1554.

The staff's evidence was entirely in favor of the applicant's position, without a single point of difference between the staff and the applicant (Tr. pp. 573–588, 598–606, 613–635, 745–6, 782–6).

The position of the staff is summarized in the following ruling of the Presiding Examiner on the question whether the Commissioner's staff should introduce its evidence after the evidence of the applicant and before the evidence presented by the Virginia REA Association and the Secretary of the Interior (Tr. pp. 559–561):

88 "CHIEF PRESIDING EXAMINER. It is true, I assume, that the evidence you will offer will in fact support the views and contentions that you have expressed?

"Mr. GATCHELL. It will support the views which we have expressed; yes, sir. We do not do so on quite the same ground as the applicant. We have a slightly different approach than the applicant, but the evidence will support the views that I have expressed.

"CHIEF PRESIDING EXAMINER. I am aware of the difference, but as you say it will, as a matter of fact, support the views you have expressed.

"Mr. GATCHELL. Yes, sir.

"CHIEF PRESIDING EXAMINER. And those views do favor the granting of the application to the applicant in this case, is that right?

"Mr. GATCHELL. No question about it; yes, sir.

"CHIEF PRESIDING EXAMINER. Then, as a matter of law, and of fair hearing, I must rule in favor of the contention made by the REA Association of Virginia. Let me explain it this way:

"I am aware of the many reasons that exist why the staff is always representing or supposed to represent the public interest—and as a matter of fact they do represent it—I am aware of the views that make it desirable that they shall hear everything, and then come in with an expression of their views, and that is the way that we usually arrange, in our hearings, the sequence for the offering of evidence.

"But here is a case in which the staff does have a conviction, they have evidence ready to present in support of their contentions, and therefore, in support of the application. The people actually opposing the application—and I speak of matters of fact, and not of theory now—the parties and participants opposing it are the Virginia REA Association and the Secretary of the Interior. All others here support the application as a matter of fact.

"Now, with the advocates of the granting of the license, those supporting the granting of the license being all others in the hearing, except the REA Association of Virginia and the Secretary of the Interior, as a matter of law I could not have them precede staff counsel in this matter. That is the very sincere conviction of the Examiner."

89 It is evident that the Commission's staff has not adequately protected the interests which the Secretary of the Interior is seeking to protect in this proceeding.

III

Therefore, it is respectfully submitted that the Commission should reconsider its order of May 6, 1949, and that it should grant the Secretary's petition to intervene.

Respectfully submitted.

Mastin G. White,
MASTIN G. WHITE,
Solicitor of the Department of the Interior.
A. Bruce Wright,
A. BRUCE WRIGHT,
Assistant Solicitor.

Gregory Hankin,
GREGORY HANKIN,
Of Counsel.

90 Certificate of service (omitted in printing).

91 Before the Federal Power Commission

[Title omitted.]

Memorandum in opposition to application for reconsideration

To the Federal Power Commission:

Come now counsel for the Commission's staff and respectfully present the following objections to the application filed by counsel for the Secretary of the Interior for reconsideration of the Commission's order entered May 6, 1949. This order denied the petition of the Secretary of the Interior to intervene as a formal party to this proceeding.

The application for reconsideration was presented during the course of the hearing and raises two grounds upon which reversal is sought:

I. The order was in error (for the reasons originally cited in the petition to intervene).

II. New evidence requires reconsideration and that evidence is the subsequently disclosed attitude of the Commission's staff "in support of the applicant and its interests" and "in opposition to the interests of the United States and of the public except as to coincide with those of the applicant."

I

As to the first ground for seeking reversal of the order, it would seem that the Secretary of the Interior quite properly does

92 not argue that decision again, for the order of May 6 completely and fully decided all of the issues which may be or have been raised in this case in connection with the formal intervention of the Secretary. Since no argument is offered for the Secretary except in reiteration we have no further comment to make upon this ground, since we believe the Commission to have been correct in its order.

II

Under the guise of "newly discovered evidence", the application for reconsideration makes certain allegations with respect to the staff of the Commission, and particularly to counsel for the staff. Even if all of these allegations were true—which they are not—they would not constitute appropriate grounds for reversal of the order.

While the Secretary was not permitted to intervene as a formal party, the Commission pointed out in its order that, as customary, his participation in the presentation of evidence and in argument and the filing of briefs would be welcomed. In harmony with the Commission's attitude and prior practice, and in full recognition of the interests of a coordinate Federal agency, the record shows abundantly that the Presiding Examiner in this case has been most liberal in his rulings and has allowed counsel for
93 the Secretary the widest possible latitude in the presentation of argument and evidence[4] and the privilege of the fullest cross-examination of witnesses.

Notwithstanding the provocative language used in the application for reconsideration, there is no allegation that full participation by counsel for the Secretary has been in any way restricted during the course of the hearing or that it will be restricted during the balance of the proceeding before the Examiner and the Commission. Only if limitations were being placed on the participation on behalf of the Secretary or limitations were threatened, would any allegations of "newly discovered evidence" be material.

Counsel for the staff (on pages 24–30 and 557–565) stated quite frankly the position of the staff, which is that the amended application seeks authority to construct and operate a project which, in the opinion of the staff, is best adapted to a comprehensive plan of development of these water resources; this project should not

[4] As; for example, hearsay evidence, such as Ex. 43, a letter to the Secretary from another Federal agency, submitted without supporting data of any kind (Tr. 953-958); and certain estimates which were not even presented by counsel for the Secretary as substantive evidence of the estimates themselves (Tr. 907, 909). Also, counsel for the Secretary suggests in the application for reconsideration that staff counsel objected "to oral testimony embodying a statement of policy by the President of the United States," although failing to point out that the oral testimony referred to was the unnecessary reading of a portion of an exhibit, No. 49, which the Secretary's counsel had introduced without objection by staff counsel (Tr. 970).

be constructed by the United States, and the license applied for should be authorized. At the same time staff counsel stated that these staff views were subject to change and would be changed at any time if the evidence presented in the hearing justified such a change (Tr. 25, 559).

94 As stated by the Chief of the Commission's Bureau of Power, when the application for license for Project No. 2009 was filed in October 1948, the engineering staff was aware of its conflict with the Roanoke Rapids project as proposed in House Document 650 (Ex. 1), and made a thorough engineering investigation. Several conferences were held with representatives of the applicant and the staff made concrete suggestions for modification of the plans of the applicant (Tr. 1906–08). The applicant agreed that these suggestions would develop this stretch of the river in a more comprehensive manner and in April 1949 amended its application and proposed a project which would cost over six million dollars more than the one originally proposed (Tr. 1931). In making suggestions for modification of the original plans proposed by the application, the Bureau of Power was merely following the practice of the Commission since its creation and as set forth in Section 10 (a) of the Act (Tr. 1909). The staff would have been derelict in its duty to the Commission, to the applicant, to the interveners, and to the Secretary of the Interior if, after having made extensive studies of the situation, it had failed to state the conclusions which had been reached as a result of those studies. Furthermore, the staff has stated its intention of changing its views whenever the factual evidence would justify modification of its original position.

The crux of the application for reconsideration will be found not in the trivia which it contains, but in the very apparent fundamental difference between the interpretation of the Federal

95 Power Act and the Flood Control Act of 1944 by the Secretary of the Interior and the interpretation by the Commission and its staff heretofore followed. It is not appropriate to discuss here this difference in views, but we will do so in our briefs.

Under all of the circumstances we suggest that the application for reconsideration fails to state any valid reasons why the Com-

mission should reverse its order of May 6, 1949, and we urge that the application be denied.

Respectfully submitted.

WILLARD W. GATCHELL,
Assistant General Counsel,
WILLIAM J. COSTELLO,
Attorney,
JOAN M. MOON,
Attorney,
Commission Staff Counsel.

WASHINGTON, D. C., *June 15, 1949.*

96 Certificate of service (omitted in printing).

98 Before the Federal Power Commission

[Title omitted.]

Memorandum of opposition to application for reconsideration

To the Honorable the Federal Power Commission:

Virginia Electric and Power Company, applicant in this proceeding, comes now to oppose the application of the Secretary of the Interior for reconsideration of the Commission's order entered herein on May 6, 1949. That order rightly denied the Petition of the Secretary of the Interior to intervene as a formal party to this proceeding and no adequate basis for reconsideration of that order has been demonstrated.

The Application for Reconsideration presents two aspects: (a) that the order was erroneous and (b) that subsequent developments afford a basis for a reversal of that order. In both aspects the Application is utterly without merit.

(a)

With respect to the contention that the order of May 6, 1949, was erroneous, the Secretary has offered no new reasons or material, but asks merely that the Commission reconsider the materials previously submitted.

99 The order of May 6, 1949, found that:

"In acting upon this application for license under Part I of the Federal Power Act, the Commission of necessity must consider the public rights and interests in the development of the water resources involved, and, of course, it is not necessary to admit the Secretary of the Interior as a formal party since his assistance as a coordinate Federal Agency is always welcomed in order to secure full presentation of the issues involved. * * *

* * * * * * *

"Formal intervention by the Secretary of the Interior is unnecessary * * *."

The order of May 6, 1949, was entered only after all parties had been given full oportunity to present and support their respective points of view. This is demonstrated by the fact that the Secretary had filed two Petitions to Intervene with Memoranda in support, the Commission's staff had filed two Answers in Opposition to Intervention, the Applicant had filed two Answers in Opposition, and the Secretary had filed a brief in reply to the opposition of the staff and the Applicant. Thus, the issues before the Commission at the time entry of the order of May 6, 1949, had been fully presented and fully briefed. Despite this the Secretary, without disclosing any new reasons or new material in support or demonstrating any error, requests that the Commission reexamine its order, stating that its ground was "in the nature of an assignment of error." Such a request could hardly have been made with the expectation of serious consideration.

100 However, if the Commission should determine to reexamine its order upon this ground, then Virginia Electric and Power Company reiterates the contentions previously made in opposition to the intervention of the Secretary that:

(1) The Secretary of the Interior has no interest herein;

(2) The interest which the Secretary of the Interior is attempting to assert is not the interest of the Department of the Interior, but is the interest of the United States which interest the Federal Power Commission is charged by law to protect; and

(3) The public interest will not be served by the formal intervention herein by the Secretary of the Interior.

For these propositions, in the event of any such reconsideration, the Company asks that the Commission consider the reasons and authorities, which are fully applicable and controlling, contained in the Company's Answer to Petition to Intervene and Memorandum in Support Thereof, filed April 11, 1949, and its Objection to the Intervention of the Secretary of the Interior and Answer to His Petition to Intervene, filed May 2, 1949.

(b)

The second ground is stated to be "in the nature of newly discovered evidence." In fact, this second ground, as stated by
101 the Secretary, is no more than a scurrilous attack upon the staff of this Commission. The events which have occurred since the order of May 6, 1949, serve not as a basis for the reconsideration of the Commission's order of that date but actually serve to vindicate the correctness of the findings therein contained.

The Secretary implies that the staff of this Commission has subordinated the interests of the United States to those of the Applicant. The basis for this implication is the fact that the staff has not agreed with the Secretary of the Interior and has quite frankly supported its own views with respect to the application for license.

The Secretary of the Interior obviously has overlooked the purpose and policy of the Federal Water Power Act which the Staff and this Commission are charged with carrying out. Colonel E. Robert de Luccia, Chief of the Bureau of Power of the Federal Power Commission, stated this policy on page 1927 of the record as follows:

"Furthermore, one of the primary purposes of the Federal Power Act is to secure and encourage utilization and development of water resources in a manner which would fully protect the interests of the public in these resources."

The position of the staff was not taken without regard to the interests of the United States. Thus, Colonel de Luccia further testified at page 1925:

"In our staff study of the application for license for Project 2009, we have given exactly the same analysis as in similar cases heretofore. We do not consider that the public benefits would be lost if construction of the Roanoke Rapids plants is not undertaken by the United States."

102 Nor was the staff favorable to the proposals of the Applicant throughout. On the contrary, the staff did not support the original application, but, after consultation, which is not unusual, the Applicant amended its project to conform to plans which the Commission's staff recommended. Thus, Colonel de Luccia testified at page 1929:

"Q. Colonel, you referred in your testimony to a final conference, I believe, as you described it, held on March 16, 1949, between representatives of the applicant, the Office of the Chief of Engineers, and the Bureau of Power of the Federal Power Commission, during which agreement was reached on the project as now proposed, the amendment filed April 6, 1949, to the regular

application for a license. Are you familiar with the original application for a license filed on October 6, 1948, and the amendment to the license filed April 5, 1949?

"A. I am familiar to the extent that I have indicated.

"Q. Do you understand that the applicant filed the amendment to the license, changing the project as originally proposed, principally by providing for the construction of the tailrace and other details, with a view to satisfying the objections and opposition which had been indicated on the part of the staff of the Commission, with respect to the project as originally proposed?

"A. Well, Mr. Moore, as in all cases of this type, when we find that a project proposed is, in our opinion, not adaptable to a comprehensive plan, we make such modifications and suggestions, or suggestions, rather of modifications as will cause that plan to become adaptable to our comprehensive plan, and that was the kind of action taken in this particular case.

"Q. I certainly wanted to find out whether it was your understanding that the amendment to the application, which was filed by the applicant, was filed with a view to satisfying the objections which have been raised by the staff in the conference that you have referred to.

"A. I believe that that was probably the intent."

103. The actions of the Staff of this Commission in this proceeding do not warrant reproach in any respect, and the insinuations of the Application for Reconsideration are an uncalled for reflection upon the integrity of the Staff of this Commission.

The true situation, as shown by the record herein, discloses that there is no need for formal participation by the Secretary.

The order of May 6, 1949, provided:

"The petition of the Secretary of the Interior for formal intervention is denied; provided that such denial shall not be construed as curtailing or otherwise affecting the privilege of the petitioner as head of one of the coordinate departments of the United States, to introduce evidence relevant and material to the issues in the proceeding as set forth in the Commission's order of March 22, 1949, to make oral argument and to file briefs."

The Chief Presiding Examiner who has presided over the hearings herein, has interpreted the order of May 6, 1949, liberally and has afforded the Secretary every right of a party at the hearings herein. Thus, the Secretary has had full opportunity to present evidence, to cross-examine and to fully argue. The Secretary has taken full advantage of this opportunity. He has presented witnesses; he has cross-examined all witnesses whom he desired to cross-examine, and the hearing has been delayed to give him full opportunity to do so (Transcript pp. 101-111, 173-174), and his representative has argued orally almost without limitation. Of

the 2,063 pages constituting the record so far, only a few hundred do not contain some argument by the representative of the Secretary. The Secretary has not charged that the Chief
104 Presiding Examiner has denied him any of these privileges.

The result is that there is no doubt that the interests which the Secretary claims to represent have so far had as much representation as he is able to give them. He has been in no manner restrained by the Chief Presiding Examiner and the interest which the Secretary seeks to represent has been afforded full protection at the hearings and is fully presented in the record. Since the order of May 6, 1949, contemplates oral argument and the filing of briefs by the Secretary before the Commission itself, the Secretary will have been afforded all the privileges of a party and has, thus, shown no reason for a change in the order of May 6, 1949.

Since he has enjoyed all the privileges aforesaid, the only conceivable reason for the present application is an attempt to appeal the decision of this Commission should it not coincide with the view of the Secretary. Since by law, this Commission is charged with the function of deciding for the United States the questions presented by applications for hydroelectric projects on navigable waters, it is inconceivable that the public interest would be served by a contest in the Courts between this Commission and another agency of the Government which is not charged with any duty with respect to such decisions.

There is nothing in the Application for Reconsideration
105 sufficient to cause this Commission to reconsider its order of May 6, 1949, which Virginia Electric and Power Company submits was plainly right in so far as it concerned the Secretary of the Interior and should not be reconsidered.

Respectfully submitted.

VIRGINIA ELECTRIC AND POWER COMPANY,

By (Signed) T. Justin Moore,
T. JUSTIN MOORE,

(Signed) Patrick A. Gibson,
PATRICK A. GIBSON,

(Signed) Francis V. Lowden, Jr.,
FRANCIS V. LOWDEN, JR.,

1003 Electric Building, Richmond, Virginia,
Its Counsel.

Dated June 14, 1949.

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE.
1003 Electric Building, Richmond 12, Virginia
Of Counsel.

106 Verification (omitted in printing).
Certificate of service (omitted in printing).

108 Before Federal Power Commission

[Title omitted.]

Order denying application for reconsideration

June 22, 1949

The Secretary of the Interior on June 6, 1949, filed an application for reconsideration of the Commission's order of May 6, 1949, denying him leave to intervene as a formal party in the above proceeding. It does not appear from the Secretary's application for reconsideration that he has been refused any rights of full participation in the proceedings before the Commission or in the hearing which has just been concluded before the Commission's Examiner.

The Commission finds:

No good reason has been shown for reversal of the order of May 6, 1949.

The Commission orders:

The application for reconsideration referred to is hereby denied.

By the Commission.

LEON M. FUQUAY,
Secretary.

109 Before the Federal Power Commission

[Title omitted.]

Second application for reconsideration

1

We are filing this Second Application for Reconsideration because the decision rendered on June 20, 1949, by the Supreme Court in the case of United v. Interstate Commerce Commission, The United States of America, The Pennsylvania Railroad Company, et al. (No. 330, October term, 1948), squarely supports our contention that it would be proper for the Secretary of the Interior to seek judicial review of a decision rendered by the Federal Power Commission.

There, representatives of the Departments of Justice and War, acting on behalf of the United States, filed a complaint with the Interstate Commerce Commission against certain railroads, charging that the railroads, by reason of their refusal to make the War Department an allowance for wharfage and handling services,

had subjected the Government to the payment of rates and charges which were unjust, unreasonable, discriminatory, and excessive. In its complaint, the United States sought an award for the damages which it had sustained. The Commission dismissed the Government's complaint (264 I. C. C. 683, 269 I. C. C. 141).

The United States then brought action under the Urgent Deficiencies Act to set aside the Commission's order. Be-
110 cause of certain provisions in that act, the United States had to be named as a party defendant, and therefore the action in the district court was entitled United States v. Interstate Commerce Commission and United States. The railroad companies intervened and filed an answer, alleging that the district court had no jurisdiction because the United States was both plaintiff and defendant in the action, and that, therefore, there was no "case or controversy." The United States District Court for the District of Columbia, sitting as a three-judge court, so held (78 F. Supp. 580), and the United States appealed to the Supreme Court.

The Supreme Court reversed and remanded the case, holding that the real parties in controversy were not the United States and one of its agencies, the Interstate Commerce Commission, but the United States and the railroads; that the substance, not the form, governed the disposition of the case; and that the district court had erred in dismissing the complaint.

In opposition to the petition of the Secretary of the Interior to intervene in the Matter of the Application of the Virginia Electric and Power Company for a license to construct a project at Roanoke Rapids, both the applicant and the Commission's staff asserted and reasserted that the application should be denied because, in the event of a decision adverse to the view of the Secretary of the Interior, the Secretary could not invoke the authority of the United States Court of Appeals to review such a decision, since that would involve a controversy between two branches of the United States Government, or a suit by and against the United States. We pointed out that, in the event of such a decision
111 by the Commission, the controversy would not be between the Secretary of the Interior and the Commission, but between the Secretary and the Virginia Electric and Power Company.

We submit that this decision of the Supreme Court sustains our position on this point and indicates that the Secretary's petition to intervene should be reconsidered and granted in the light of this decision.

2.

The following significant statement was made by staff counsel in opposing the Secretary's first application for reconsideration of the order denying the Secretary's petition for intervention:

"The crux of the application for reconsideration will be found not in the trivia which it contains, but in the very apparent fundamental difference between the interpretation of the Federal Power Act and the Flood Control Act of 1944 by the Secretary of the Interior and by the Commission and its staff heretofore followed."

No better reason could be assigned for intervention and for the granting of the petition to intervene. If it should develop that there is indeed a fundamental difference between the Secretary and the Commission on a matter of statutory interpretation in a field where the Commission's decision substantially affects the functions of the Secretary, the Secretary should be in a position to seek judicial review of the Commission's interpretation.

3

The matters discussed in our first application for reconsideration are not trivialities, as stated by staff counsel. The Commission should consider them on their merits.

Staff counsel is mistaken in stating (without specification
112 or reference to the transcript) that our allegations in the first application were not true. All our allegations are supported by references to the transcript.

The applicant may feel that its position is improved by characterizing our application as a "scurrilous attack upon the staff of the Commission". We cannot agree that this is a correct characterization. We stated facts as to the forthright position taken by the staff, and no attack, scurrilous or otherwise, was made on the staff.

Respectfully submitted,

Mastin G. White,
MASTIN G. WHITE,
Solicitor of the Department of the Interior.

A. Bruce Wright,
A. BRUCE WRIGHT,
Assistant Solicitor.

Gregory Hankin,
GREGORY HANKIN,
Of Counsel.

113 Certificate of service (omitted in printing).

115 Before the Federal Power Commission

[Title omitted.]

Memorandum in opposition to second application for reconsideration

July 1, 1949

To the Honorable the Federal Power Commission:

Counsel for the Secretary of the Interior has again, by a Second Application for Reconsideration, sought reversal of the Commission's Order of May 6, 1949, which afforded the Secretary full participation in the hearings in this case but denied him the formal status of an intervening party.

This repeated claim that the Commission is wrong and should reverse itself is founded upon the decision of the United States Supreme Court on June 20, 1949, in U. S. v. Interstate Commerce Commission, The United States of America, the Penn. Railroad Company, et al. (No. 330, October Term, 1948). The decision determined rights to court review under the provisions of the Interstate Commerce Act in cases of money awards by the Inter-
116 state Commerce Commission upon claims for damages under that Act. It is asserted that the decision sustains the contentions made for the Secretary in seeking to intervene in this proceeding. It is asserted that the decision contradicts the contentions made in opposition. Neither assertion is correct.

So wide an arc has been described in formulating this last attack upon the action of the Commission that the assertions depart entirely from the contentions which were in fact advanced on behalf of the Secretary. The assertions also depart entirely from the opposing contentions. The recited contentions were not made. The issue described by the Second Application was not placed before the Commission.

The Second Application claims (page 1) that the cited decision "squarely supports our contention that it would be proper for the Secretary of the Interior to seek judicial review of a decision rendered by the Federal Power Commission."

The several documents filed on behalf of the Secretary setting forth his various contentions for his effort to intervene as a party are searched in vain for any such contention. No more can be found than the assertion that, in connection with the rule that only a "person" can file an application for rehearing as the pre-
117 requisite for court review under Section 313 (d) of the Federal Power Act: "The Secretary is a person in fact, and our law has not so far strayed from reality as to fail to recognize a fact so obvious." See the Secretary's Reply, May 6,

1949, to Memoranda by the Staff and by the Applicant opposing the Secretary's (second) Petition to Intervene, page 6; see also the Secretary's (withdrawn) Memorandum of April 20, 1949, page 5.

On the contrary, the contention made on the Secretary's behalf as to his right to judicial review was that the matter made no difference, that it was not a question to be decided by the Commission, and was not to be considered in passing upon the Petition to Intervene. It was said (Reply Memorandum, ubi supra, page 6):

"However, with all that has been said on this matter by Staff Counsel and the Applicant, it is evident that whether the Secretary, if a party to the proceeding, would or would not have standing to seek judicial review of an order of the Commission is not a question which the Commission can determine. Intervention before the Commission would not of itself create such right. Moffat Tunnel League v. United States, 289 U. S. 113. Consequently, consideration of that point should not have any influence upon the Commission in passing upon the Secretary's Petition to Intervene for the purpose of protecting his statutory interest in this matter."

Thus the decision now relied upon by the Secretary has no bearing upon any contention that the Secretary heretofore has
118 advanced. Upon his own contentions the ruling in that case makes no difference.

Turning to the conflict which the Second Application claims to exist between the cited decision and the contentions opposing the Petition to Intervene, it is equally as difficult to recognize in the recital of those contentions the contentions that were in fact laid before the Commission.

It is said (page 2) that denial of the Petition to Intervene was urged by the Staff and the Applicant on the ground that the Secretary could not in this proceeding seek judicial review because that would involve "a suit by and against the United States."

No such universal bar was submitted to the Commission. The principles advanced by the Applicant and by Staff Counsel opposing formal intervention by the Secretary nowhere rested upon any blanket rule of prohibition against the sovereign suing the sovereign.

The objection that for intervention in this case the Secretary could represent no interests other than the interests of the United States was not addressed to any claim that the sovereign can never sue the sovereign. It invoked the law established by the Federal Power Act whereby, for consideration of and action upon an application for a license under that Act, the Federal Power Commission is the agency charged with representation of

119 the interests of the United States, and the Secretary of the Interior is not. It was advanced for the inescapable conclusion that the Secretary's representation of the interests of the United States as a party here would surrender to the Secretary functions committed by the Federal Power Act to the Commission, a surrender of authority and responsibility not to be sanctioned by the Commission. See Applicant's Objection to Intervention, pages 5–6; Applicant's Memorandum of Objection to Application for Reconsideration, pages 3, 7; Answer of the Commission's Staff in Opposition to Petition to Intervene, pages 1–2 and 6.

The contentions of Staff Counsel opposing the Petition to Intervene also emphasized the impropriety, in any case such as this where there is no authorization from Congress, of judicial solution of conflicting claims of jurisdiction between contesting administraitve agencies—the Secretary's principal contention on the merits in this proceeding being jurisdictional. See Opposing Memorandum of Staff Counsel, page 9. Quite to the contrary of the contention now attributed by the Secretary to the Staff that the sovereign can never sue the sovereign, the Staff conceded (page 2 of the Memorandum) that: "Congress has, in some cases, provided that one agency may intervene in the proceedings of another, and if aggrieved, may seek judicial review."

120 The Supreme Court decision now invoked has no bearing. The Court's interpretation in that case of provisions of the Interstate Commerce Act governing court review of awards by the Interstate Commerce Commission on claims for damages has no connection with the measure of the Federal Power Commission's functions as prescribed by the Federal Power Act. Its interpretation of rights to assert money claims under the Interstate Commerce Act throws no light upon the unsupported claim by the Secretary of the Interior to an interest in this proceeding under the Federal Power Act. Nothing new or pertinent is advanced by the Second Application as to the contention by both the Applicant and the Commission's Staff that the Commission should take no action which might constitute any official sanction by the Commission itself for the existence of any such interest in the Secretary of the Interior, or of any such right of participation in the conduct of Commission hearings, as to entitle the Secretary to judicial review.

Litigation by the Secretary of the Interior in Appellate Courts on the question whether a license should be granted under the Federal Power Act in this case would in itself take over to that extent the functions of the Federal Power Commission. If the Secretary conceives the law to permit such confusion and dispersion of authority in administration of the Federal Power

121 Act, he cannot expect the Commission itself to take any

action giving any sanction to such a view. The action of the Commission in denying formal intervention was entirely proper and neither new reason nor authority is shown for the Second Application.

Nothing new is advanced bearing upon the Commission's finding that the Secretary has in fact been afforded the fullest participation in the hearing.

As a part of point one of the Second Application, the Secretary relies upon the claim that this case is not a controversy between the Secretary of the Interior and the Commission but between the Secretary and the Virginia Electric and Power Company. In point two, the Secretary claims support for his position by reasoning that the real controversy is between himself and the Commission. Point 3 merely joins issue on certain contentions. Nothing new or adequate for the Commission's reversal of its action is afforded.

For these reasons Virginia Electric and Power Company, the Applicant in this proceeding, opposes the Second Application of the Secretary of the Interior for reconsideration of the Commission's order entered herein on May 6, 1949, and submits
122 that no reason for reconsideration is advanced and that the Secretary's claim should again be denied.

Respectfully submitted.

VIRGINIA ELECTRIC AND POWER COMPANY,
By (Signed) T. Justin Moore,
T. JUSTIN MOORE,
(Signed) Patrick A. Gibson,
PATRICK A. GIBSON,
(Signed) Francis V. Lowden, Jr.,
FRANCIS J. LOWDEN, JR.,
1003 Electric Building, Richmond, Virginia,
Its Counsel.

123 Verification (omitted in printing).
Certificate of service (omitted in printing).

126 Before Federal Power Commission

[Title omitted.]

Answer to second application for reconsideration

In his Second Application for Reconsideration filed June 23, 1949, the Secretary of the Interior urges the Commission to reconsider its orders of May 6, 1949, and June 21, 1949, by which

he was denied the status of formal intervener in the above-entitled proceeding.

The staff opposed the original petition to intervene because it believed that giving the Secretary formal status in this case would be tantamount to an attempt by the Commission to enlarge the scope of the review provision of the Act, inasmuch as the Secretary is not a "person." The staff suggested that the full rights of participation be given to the Secretary, insofar as the proceeding before the Commission is concerned. The staff also pointed out that in the Federal Water Power Act and in its subsequent amendments, the authority to grant or deny applications for private development of hydroelectric power from the Nation's waterways had been delegated by Congress to the Federal Power Commission, and that to admit the Secretary as a formal intervener, as a practical matter, would amount to a sharing of this statutory responsibility by the Commission with other agencies of the Government—a sharing never contemplated or intended by Congress—although changes had been made in the statute from time to time.

127 The question we now shall discuss is whether or not the reasons originally advanced by the staff have lost their force in the light of subsequent events, particularly in view of the decision of the Supreme Court of the United States announced on June 20, 1949 in United States v. Interstate Commerce Commission, United States of America, the Pennsylvania Railroad Company, et al. (No. 330, October Term, 1948). It is our position in this Answer that the reasons set forth in our Answer to the original petition to intervene are not affected by this decision of the Supreme Court of the United States.

The principal thesis of the filing of June 23, 1949, is that the Commission should about face on its orders of May 6, 1949, and June 21, 1949, because of this Supreme Court decision. If the previous orders are to be reversed, it must be because the Commission has accepted the interpretation of the Supreme Court's decision by the Secretary's counsel.

Careful study of the Supreme Court's opinion, and the lower court's opinion which was reversed, does not afford the simple and clear cut result claimed by the Secretary in his present application. Even a superficial study of the opinion will reveal that the Supreme Court was not as interested in the basic proposition of whether the sovereign can sue the sovereign as it was in several other questions in the case.

Admittedly, there are exceptions to the proposition that the sovereign cannot sue the sovereign, but these exceptions must be made only in proper cases. Such an exception was made in

128 the June 20, 1949 opinion where the Supreme Court found

that the subject matter of the controversy was of a "traditionally justiciable" type and that the real parties in interest were not the agencies of the Government in conflict with each other, but were the Government in a proprietary capacity on one hand against a private railroad company on the other, with an agency of the Government (I. C. C.) which had acted as an arbiter joined with a purely statutory defendant (the U. S.). The Government in this case did not sue as the sovereign, but in the proprietary capacity of a shipper. The Government was not trying to collect money damages from its agent, the I. C. C. or from itself, nor was one Government agency in its individual capacity attacking an administrative ruling of another individual Government agency. The Government was attempting to secure the return of sums of money from a railroad which, it maintained, had been illegally extracted from it. In other words, the Government asked the same treatment of its claim as would be given to any private shipper. The right of the United States to so assert its claim was obscured by the fact that in actions under the Urgent Deficiencies Act, the United States, by statute, must be named as a defendant.

We have this important difference between the two matters: In the decided case there was a money claim ("traditionally justiciable") by the United States as a shipper against a railroad; in the present case we have an application for licence on a navigable water—a matter clearly and exclusively within the discretionary province of the Commission—the granting of which is being questioned by an agency of the Government which has
129 no present or even anticipated authority from Congress, real or implied, to construct a project on the same site or on any site in the river basin, even if the pending application for a license is not granted. If the Roanoke Rapids project is ever built by the United States, it must be assumed under present law and Congressional custom that the authorization will be given to the Corps of Engineers.

In order that the Secretary's argument can be sustained that the decision in U. S. v. I. C. C. is controlling in the VEPCO case, it is necessary to decide that the real parties in interest in any Court review would not include the Federal Power Commission. Such a holding would be dangerous and is certainly not necessary from a legal standpoint. In the I. C. C. Case, the I. C. C.'s position was comparable to that of a statutory court of the United States. The I. C. C. entertained a controversy arising between two contestants and had determined that one of the contestants had no legal standing to sue. There was no frontal assault made by any part on the jurisdiction of the Interstate Commerce Commission to entertain and decide the matter.

Here Federal Power Commission jurisdiction to issue a license in this case has been challenged and the Federal Power Commission will be a real party in interest in any court where this matter is to be discussed or determined until the matter of its jurisdiction is finally settled. Neither the Government nor the Secretary of the Interior have a claim against Virginia Electric and Power Company, the applicant herein, nor is a controversy of a
130 "traditionally justiciable type" involved here. Once a license is authorized, if such event should take place, the Secretary properly cannot bring any action against the successful applicant as the real party in interest unless a court would allow review of the Commission's order in some manner other than under Section 313 (b). Under this review provision it would seem to be quite clear that the Federal Power Commission as the agent of the sovereign United States would have the sole burden of defending its order which, when issued, becomes the order of the Government. The Supreme Court decided that the United States was a nominal defendant in U. S. v. I. C. C. because of the statutory requirement of the Urgent Deficiencies Act. The I. C. C. as the administrative tribunal appeared for the purpose of showing that its order was supported by substantial evidence.

The Commission should hesitate to change its position because of the possible implications of a Supreme Court opinion which is contained in seventeen pages and is accompanied by a twenty-eight page dissent. The implications of the decision are far from clear as applied to what seems to us to be a very dissimilar situation.

Our answer to this application does not deal with points 2 and 3 of the Secretary's application which have been urged before the Commission in the same or similar language since the original petition to intervene was filed. They appear to be red herrings, or, more charitably, afterthoughts, which require no specific answer.

We merely reiterate our presentation in the Staff's Answer to the first application for reconsideration (and not contro-
131 verted in the present application by the Secretary) that no claim has been advanced by the Secretary that any right or privilege of participation in the proceeding before the Commission has been denied him. Much has been made of the fact that the counsel for the staff have disagreed with the sometimes oblique approach of the Secretary's special counsel to some of the legal problems posed by the proceeding. Such disagreement, however deplorable it may be from the Secretary's standpoint, obviously has no bearing upon any issue in this proceeding nor upon any aspect of due process.

It is our sincere belief that Congress delegated to the Federal Power Commission exclusive authority to administer the development of the nation's water resources by private interests, in the absence of a discretionary finding by the Commission under Section 7 (b). The actions and filings by the Secretary in this matter show clearly that he believes that this authority is to be shared with him under certain circumstances and largely upon his own terms. As we urged in our May 5, 1949, answer to the original petition, if the Secretary is to have support in his view of the law, this support, in the form of a recognition of rights by giving him the status as a formal intervener, should not come from the Commission. If the class of potential litigants set forth in Section 313 is to be expanded to include the Secretary as a "person", the Commission should leave such basic amendment of the Act to the body which enacted it—the Congress of the United States.

132 We urge the Commission either to reaffirm its order of May 6, 1949, or to take no further positive action of any kind on the matter of the Secretary's formal intervention.

Respectfully submitted.

WILLIAM J. COSTELLO,
Attorney,

JOAN M. MOON,
Attorney,
Commission Staff Counsel.

133 Certificate of service (omitted in printing).

134 Before Federal Power Commission

AUGUST 30, 1949.

[Title omitted.]

Order granting application to reconsider denial of petition to intervene

September 2, 1949

On April 4, 1949, Julius A. Krug, Secretary of the Interior, filed, by his counsel, a formal petition praying that he, as head of one of the Executive Departments of the United States Government, be permitted to intervene in the above-entitled matter. This petition to intervene was denied by order adopted May 6, 1949.

An application for reconsideration of the denial of intervention was filed on June 6, 1949, and denied by the Commission by order adopted June 21, 1949.

On June 23, 1949, counsel for the Secretary of the Interior filed a brief in support of the Secretary's petition, which was entitled a second application for reconsideration, and which we will regard as such.

A hearing was held on the application of Virginia Electric and Power Company for a license to construct Project No. 2009, the hearing commencing May 12, 1949, and being concluded on June 16, 1949. During this hearing counsel for the Secretary of the Interior participated by filing motions, presenting evidence, cross-examining witnesses and stating objections to questions, and has been invited by the Presiding Examiner to file briefs within periods which have been extended at the request of the Secretary's counsel.

The Commission orders:

The application of the Secretary of the Interior for reconsideration of the orders of May 6, 1949 and June 21, 1949, is hereby granted. The question of the participation of the Secretary
135 of the Interior as a formal intervener in the above-entitled cause is hereby included among the issues to be decided in this proceeding. In the meantime, the Secretary of the Interior is privileged to continue full participation herein as previously.

By the Commission.

J. H. GUTRIDE,
Acting Secretary.

137 Before Federal Power Commission

[Title omitted.]

Exceptions of Virginia Electric and Power Company to portions of the recommended decision of the chief presiding examiner and to certain of the findings and conclusions of fact and law contained in the decision

Virginia Electric and Power Company, the applicant herein, agrees with the findings, conclusions, and recommended decision of the Chief Presiding Examiner contained in his Decision of March 17, 1950, and in the Supplement thereto of November 15, 1950, except in the conclusion that formal intervention in this case by the Secretary of the Interior should be allowed. For the purpose of that exception only, the applicant, in accordance with § 1.31 of the Commission's General Rules and Regulations (18 CFR 1.31), takes exception as hereinbelow set forth.

138 EXCEPTIONS TO CERTAIN OF THE FINDINGS AND CONCLUSIONS IN THE DECISION OF MARCH 17, 1950

Applicant excepts to the following finding and conclusion on page 9:

"It would appear that the Commission, by giving the Secretary the right of participation in the proceeding before it, must have felt that such participation may be in the public interest and appropriate to the administration of the statute under which this proceeding is brought, even though he might not be a necessary or indispensable party."

Applicant proposes that the following finding and conclusion, in which the portion not underlined is identical with the above text and the portion underlined is new, should be adopted in lieu of the foregoing:

It would appear that the Commission, by giving the Secretary the right of participation in the proceeding before it to the extent directed by the Commission, must have felt that such participation to that extent, may be in the public interest and appropriate to the administration of the statute under which this proceeding is brought, even though he might not be a necessary or indispensable or appropriate party, and that formal intervention was not properly to be permitted.

Applicant excepts to the following finding and conclusion on pages 9–10:

"It is considered also, upon the record that the Secretary
139 does have an interest sufficiently substantial adequately to support his request for the status of intervener, and it is not desired to split technical hairs either on this point or with reference to the meaning or the correct definition of the word 'person'."

Applicant proposes that the following finding and conclusion, in which the portion not underlined is identical with the above text and the portion underlined is new, should be adopted in lieu of the foregoing:

"It is considered also, upon the record that the Secretary does not have an interest sufficiently substantial adequately to support his request for the status of intervener, and it is not desired to split technical hairs either on this point or with reference to the meaning or the correct definition of the word 'person.'"

Applicant excepts to the following finding and conclusion on page 10:

"It is held both that the Secretary is a 'person' within a reasonable interpretation of the Act and that he is qualified by his interest and identity formally to intervene in this proceeding. Fur-

ther, the Secretary's intervention may well be in the public interest."

Applicant proposes that the following finding and conclusion, in which the portion not underlined is identical with the above text, except that the portion bracketed is proposed by the applicant to be deleted, and the portion underlined is new, should
140 be adopted in lieu of the foregoing:

It is held both that the Secretary is not a "person" within a reasonable interpretation of the Act and that he is not qualified by his interest and indentity formally to intervene in this proceeding. Further, the Secretary's intervention [may well be] is not in the public interest.

Applicant excepts to the following finding and conclusion on page 78:

"(6) The grounds presented by the Secretary of the Interior for participation as an intervener in the proceeding are adequate under the General Rules of the Commission, and such participation as an intervener in the Commission's proceeding well may be in the public interest."

Applicant proposes that the following finding and conclusion, in which the portion not underlined is identical with the above text except that the portion bracketed is proposed by the applicant to be deleted, and the portion underlined is new, should be adopted in lieu of the foregoing:

"(6) The grounds presented by the Secretary of the Interior for participation as an intervener in the proceeding are not adequate under the General Rules of the Commission, and such participation as an intervener in the Commission's proceeding [well may be] is not in the public interest."

Applicant excepts to the following portion of the Chief
141 Presiding Examiner's recommended decision set forth on page 80 as follows

"(A) The Secretary of the Interior be and he hereby is permitted to become an intervener in this proceeding: Provided, That such status as intervener shall relate back to and be effective as of May 12, 1949, the opening date of the hearing on this matter, and that the participation of the intervener in the proceeding since that date shall be considered as limited to matters affecting asserted rights and interests specifically set forth in his petition for leave to intervene, filed on April 25, 1949, and provided further, That the admission of such intervener shall not be construed as recognition that he might be aggrieved because of any order or orders entered in this proceeding."

Applicant proposes the following in lieu thereof:

"(A) Formal intervention by the Secretary of the Interior is denied."

SUPPORTING REASONS FOR THE ABOVE EXCEPTIONS

For reasons and authorities in support of the foregoing exceptions applicant respectfully refers to and incorporates herein by reference its pleadings and memoranda filed in this case under the following captions:

"Answer to Petition to Intervene and Memorandum in Support Thereof (April 9, 1949).

"Objection to the Intervention of the Secretary of the Interior and Answer to His Petition to Intervene (April 30, 1949).

"Memorandum of Opposition to Application for Reconsideration (June 14, 1949).

"Memorandum in Opposition to Second Application for Reconsideration (July 1, 1949)."

142 After initial decision of this case on March 17, 1950, the Secretary of the Interior sought and obtained a reopening. Additional evidence, exceeding a further eleven hundred pages of transcript, was taken, and extensive exhibits were filed. This was done over applicant's strenuous objection to the relevance and sufficiency of the grounds for reopening. Upon all this further protracted hearing the Chief Presiding Examiner concluded (page 8 of the Supplement to the intial Decision):

"Little, if anything, in the way of basic facts, was added to the record by the hearing held this year."

We respectfully submit that the record in this case has fully borne out applicant's above mentioned objection of April 9, 1949, to intervention by the Secretary, wherein it was said:

"The Company earnestly contends that the interest which the Secretary of the Interior claims to represent can only be the interest of the United States, which is adequately represented in this proceeding by the Staff of this Commission and which this Commission is obliged by law to protect.

"The contention of the Secretary of the Interior in this proceeding can only be that the construction of the Roanoke Rapids Dam should be undertaken by the United States.

"The determination of this question is not a function of the Secretary of the Interior. He is only authorized and directed to sell or dispose of such energy as may be produced
143 from a dam constructed by the Government. The department of Government which is specifically charged with the duty of determining whether a dam should be built by the United States rather than by private enterprise is the Federal Power Commission. This is clearly set forth in the Statute (pages 5–6).

* * * * *

"The public interest will clearly be adequately represented by the Staff of this Commission and will be protected by the Com-

mission. The public interest will not be served by the formal intervention of the Secretary of the Interior. If he has pertinent information it may be obtained by the Commission or its Staff by calling the Secretary of the Interior or members of his staff as witnesses in this proceeding. His admission as a party hereto can only lead to a prolonged hearing and a more complicated record without in any manner adding to the protection of the interests of the public.

"Furthermore, the Petition to Intervene is designed to delay the development of the natural resources of the United States and to discourage their development by private enterprise. This purpose is repugnant to public policy of the United States as outlined in the Federal Power Act, not yet overruled or altered by Congress, which public policy it is the duty of this Commission to foster. Thus, it was clearly set forth in the Report of the Committee on Commerce which accompanied the bill to the Senate, Sen. Rep. No. 180, 66th Cong., 1st Sess. (1919) as follows (pages 8-9):

* * * * *

"This bill proceeds on the theory of private development with ultimate public ownership possible * * *" (page 9).

144 "The Company submits that the interest of the United States will be adequately protected by this Commission and its staff. The addition of another party for the purpose of protecting the same interest is clearly unnecessary and, in fact, would be burdensome to the Commission as well as to the Company. The views of the Secretary of the Interior may be evidence which the Commission would desire to consider in determining the issue presented, but they should be given in an orderly way by a witness called by the Commission or its Staff in the performance of its duties as the party charged with the protection of the public interest. The fact that the Secretary of the Interior may be an appropriate witness is not ground for his intervention as a formal party hereto" (pages 5-6).

Nevertheless, in the application of the Commission's order of May 6, 1949, which extended to the Secretary certain rights of participation, the Secretary has been permitted to introduce evidence, cross-examine witnesses, argue, and file briefs—in sum, he has had full participation in fact. It was so found by the Commission's order of June 21, 1949. Indeed, under the Commission's amendment of June 15, 1950, to its reopening order of April 27, 1950, the Secretary was permitted to proceed in the reopening without limitation to the usual rules of newly discovered evidence.

What is left of importance on the issue of intervention is the effect that formal intervention may have in connection with right

to court review. On this ground, if on no other, we respectfully submit that formal intervention should be withheld for the
145 reasons set forth in the applicant's foregoing objection of April 30, 1949, including particularly the following:

"The Federal Power Act clearly places the responsibility for final decision with respect to the interest of the United States solely upon the Federal Power Commission. That is the Commission's function. That is why it was created. Persons, whose interest is other than that of the United States have recourse in appeal, if aggrieved. But, so far as the interest of the United States is concerned this Commission is the final arbiter.

"No provision for Court review by an agency of the United States is contained in the Federal Power Act. Section 313 provides for Court review on the petition of any party to the proceeding after a petition for rehearing has been filed with and denied by the Commission. But only a 'person, State, municipality or State Commission aggrieved by an order of the Commission' may file an application for rehearing. Person is defined by § 3 (4) to mean 'an individual or a corporation.' Thus the Secretary of the Interior has no right of appeal under the Federal Power Act. The same result is reached under the Administrative Procedure Act. Section 10 (a) provides judicial review only for 'persons' aggrieved. The definition of person, § 2 (b), expressly excludes agencies of the United States. It is clear therefore that the right of the Secretary of the Interior to secure judicial review of the actions of this Commission has no basis in the statutes.

"Should the Secretary of the Interior be permitted to intervene formally, that fact would lend the apparent sanction of this Commission to his exercise of its functions and since litigation by another agency of the United States upon a matter
146 which has been entrusted to this Commission has no sanction in law it should not be fostered by this Commission. Thus in Baltimore and Ohio R. Company v. United States, 264 U. S. 255 (1924) the Supreme Court of the United States said at page 268:

"'Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. * * * The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest.'

"The Company submits that courtesy to the Secretary of the Interior does not permit this Commission to abdicate its func-

tions. Humphrey's Executor v. United States, 295 U. S. 602, 628–630 (1935) (pages 5, 6, 7).

Respectfully submitted.

VIRGINIA ELECTRIC AND POWER COMPANY,
By T. JUSTIN MOORE,
PATRICK A. GIBSON,
FRANCIS V. LOWDEN, JR.
Its Counsel.

HUNTON, WILLIAMS, ANDERSON, GAY AND MOORE,
1003 Electric Building, Richmond, Virginia,
Of Counsel.

Dated at Richmond, Virginia, this 21st day of December 1950.

147 Certificate of service (omitted in printing).

148 [Clerk's certificate to foregoing transcript omitted in printing.]

149 In the Supreme Court of the United States

October Term, 1951

Nos. 658 and 659

[Title omitted.]

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto, as follows:

The Court having granted the petitions for writs of certiorari, the printed record shall consist of the printed record heretofore filed (Volumes 1–5), and a Volume 6, which shall include the following:

	Original
Letter dated October 29, 1948, by FPC to Secretary of the Interior inviting report on application	5098
Exhibit 2, Report of Secretary of the Interior, filed January 7, 1949	3636
Exhibit 3, Letter of Assistant Secretary Warne to FPC, dated January 24, 1949	3638
Exhibit 4, Letter of Assistant Secretary Warne to FPC, dated February 16, 1949	3642
Exhibit 5, Letter from Assistant Secretary Warne to FPC, dated May 6, 1949	3643

	Original
Exhibit 6, Letter from Assistant Secretary Warne to FPC, dated July 11, 1949	3644
Order setting hearing	5117
Secretary's Petition to intervene	5178
VEPCO's opposition to Secretary's intervention	5205
Petition to intervene of Virginia REA Association	5214
Answer of Commission's Staff of opposition to Secretary's petition to intervene	5220
Reply to opposition of Staff Counsel and applicant to Secretary's petition to intervene	5245
Answer of VEPCO in opposition to petition to intervene and motion to reconsider Commission's order permitting intervention of Virginia REA Association	5256
Application for reconsideration	5341
Staff's memorandum in opposition to application for reconsideration	5352
VEPCO's memorandum in opposition of application for reconsideration	5358
Order denying application for reconsideration	5369
Second application for reconsideration	5370
VEPCO's memorandum in opposition to second application for reconsideration	5377
Answer of Commission's Staff to second application for reconsideration	5388
Order granting application to reconsider denial of petition to intervene	5400
VEPCO's exceptions to portions of the recommended decision of the chief presiding Examiner	5971

It is further stipulated and agreed that the parties hereto may refer in their briefs to the typewritten record filed in this Court, and may reproduce parts thereof as appendices to their briefs.

Gregory Hankin,
GREGORY HANKIN,
Counsel for Petitioner, United States of America, on the Relation of Oscar L. Chapman, Secretary of the Interior.

Robert Whitehead,
ROBERT WHITEHEAD,
Counsel for Petitioners, Virginia REA Association, et al.

Bradford Ross,
BRADFORD ROSS,
Counsel for Respondent, Federal Power Commission.

Signed for Virginia Electric and Power Company without waiver of or prejudice to any objection by it as to the standing of any party or as to want of authority to petition in this matter in

this Court or in the United States Court of Appeals for the Fourth Circuit on behalf of or in the interest of the United States:

T. Justin Moore.
T. JUSTIN MOORE,
Counsel for Respondent,
Virginia Electric and Power Company.
Herbert B. Cohn,
HERBERT B. COHN,
Counsel for Intervenor-Respondent,
Appalachian Electric Power Co.
Charles F. Rouse,
CHARLES F. ROUSE,
Counsel for Respondent,
Carolina Power & Light Co., Intervenor.

152 Supreme Court of the United States

No. 658, October Term, 1951

[Title omitted.]

Order allowing certiorari

Filed May 5, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

153 Supreme Court of the United States

No. 659, October Term, 1951

[Title omitted.]

Order allowing certiorari

Filed May 5, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.